Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ARKANSAS PEACE CENTER, *ET AL.*,
Petitioners,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns the incineration of dioxin-containing wastes as part of the cleanup of a hazardous waste site under Comprehensive Environmental Response Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"), 42 U.S.C. §§ 9601-9675. In particular, this case seeks to ensure that the Superfund cleanup is conducted in a manner that complies with public health standards and does not present an imminent and substantial endangerment to human health. The question presented is as follows:

Does Section 113(h) of CERCLA, which governs the timing of certain challenges to the response action, bar: (A) a citizens' suit brought pursuant to the Resource Conservation Recovery Act of 1979 ("RCRA"), 42 U.S.C. §§ 6901-6981, to ensure that the cleanup is conducted in a manner that complies with public health standards and does not present an imminent and substantial endangerment to human health, and (B) diversity and pendent state law claims to enforce comparable state public health and common law nuisance standards?

PARTIES

In addition to the parties listed in the caption, Environmental Health Association of Arkansas; Jacksonville Mothers' and Children's Defense Fund; Vietnam Veterans of America, Arkansas State Chapter; and Mothers Air Watch are petitioners and were appellees below, and Randall Mathis, Director of Arkansas Department of Pollution Control and Ecology; Vertac Site Contractors; Environmental Protection Agency; and Carol Browner, Administrator of the Environmental Protection Agency, are respondents and were appellants below.

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IN THE

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No. 93-

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER; AND MOTHERS AIR WATCH,

Petitioners,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY; RANDALL MATHIS, DIRECTOR; VERTAC SITE CONTRACTORS; ENVIRONMENTAL PROTECTION AGENCY; AND CAROL BROWNER, ADMINISTRATOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This case concerns the ability of citizens to enforce federal and state law designed to ensure that the manner in which hazardous wastes are managed does not create unacceptable public health risks. Although CERCLA

expressly preserves the viability of these federal and state laws, some courts, including the Eighth Circuit below, have read a "timing of review" provision to preclude judicial review of any claims that the cleanup is being conducted in a manner that violates applicable health standards and is itself causing an imminent and substantial endangerment to human health. This approach conflicts with that taken in other cases, including *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), which the United States has asked this Court to review. No. 93-786 (petition filed November 17, 1993). This case warrants review because it raises an important issue on which the lower courts are divided. Even if this Court grants the petition in *Colorado*, it should also hear this case because *Colorado* can be decided (as the United States is urging) without resolution of the issue on which the Eighth and Tenth Circuits, and other courts are split.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit, which is reported at 999 F.2d 1212, is reproduced in the Appendix at App. 1a-15a. The orders of the district court, which are unreported, are reproduced in the Appendix at 16a-33a.

JURISDICTION

The court of appeals entered its decision on July 14, 1993, and it denied the petition for rehearing and suggestion for rehearing *en banc* on August 30, 1993. App. 3a. In an order signed on November 22, 1993, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including January 7, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Relevant provisions of RCRA and CERCLA are reproduced in the Appendix at App. 34a-44a.

STATEMENT OF THE CASE

This case concerns the harmonization of two statutory schemes -- CERCLA and RCRA -- both of which are designed to ensure that aspects of hazardous waste management and disposal do not cause harm to human health. Although CERCLA expressly preserves the applicability of RCRA to Superfund cleanups, the Eighth Circuit held that a CERCLA provision postponing challenges to CERCLA cleanup plans completely displaces RCRA standards that ensure that the cleanup of hazardous waste sites is done in a manner that protects public health. In order to understand the importance of the issue presented and the conflict among the Circuits, it is necessary to review the pertinent features of each statute and how the two statutory schemes are intended to intersect.

I. THE STATUTORY SCHEMES

A. RCRA's Comprehensive Scheme for Regulating Hazardous Waste Management to Protect Public Health.

Congress enacted RCRA in 1976 "to provide nationwide protection against the dangers of improper hazardous waste disposal." H.R. Rep. No. 1491(I), 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6249. One of RCRA's principal objectives is to "assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. §

6902(4). As the primary federal statute regulating all aspects of hazardous waste management from generation to transportation to disposal, RCRA has been heralded as providing "a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society." H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119, 6120.

RCRA requires EPA to establish performance standards for hazardous waste disposal facilities "to protect human health and the environment." 42 U.S.C. § 6924(a). Under this authority, EPA requires incinerators to achieve a 99.99% destruction and removal efficiency for designated principal organic hazardous constituents. 40 C.F.R. § 264.343(a)(1). However, EPA concluded that applying this standard to dioxin "might not be sufficiently protective of human health [and] could result in risk levels for certain situations that are in a range of questionable acceptability." 50 Fed. Reg. 1991 (Jan. 14, 1985). Accordingly, EPA requires that incinerators demonstrate a 99.9999% destruction and removal efficiency for dioxin-containing wastes. 40 C.F.R. § 264.343(b)(2).

EPA may authorize states to carry out their own hazardous waste programs in lieu of the RCRA regulatory program, so long as the state program meets minimum federal standards. 42 U.S.C. § 6926(b). EPA has given Arkansas such approval. The Arkansas Department of Pollution Control and Ecology, which administers the state's RCRA program, has adopted EPA's incinerator performance standards by reference in its own regulations. Ark. Hazardous Waste Management Code ch. 2, § 3.

RCRA also permits citizens' enforcement suits to remedy violations of RCRA standards, regulations, permits, or requirements, and citizens' imminent hazard suits to remedy hazardous waste disposal practices "which may present an imminent hazard and substantial endangerment to

health or the environment." 42 U.S.C. § 6972(a)(1)(A) & (B). Apart from generally applicable notice requirements, RCRA does not impose any specific limitations on citizens' enforcement suits in connection with CERCLA response actions. It does, however, preclude citizens' imminent hazard suits where EPA or a state is diligently pursuing designated actions under CERCLA or RCRA "in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment." 42 U.S.C. § 6972(b)(2)(B) & (C). Notably, imminent hazard suits are not precluded if, in the course of taking actions under CERCLA to restrain or abate certain hazards, EPA or a state or another party contributes to activities that present a different endangerment.

B. CERCLA Supplements RCRA With Respect to the Cleanup of Hazardous Waste Sites.

Because RCRA operates prospectively only, it was "clearly inadequate" to address "the inactive hazardous waste site problem." H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. at 17-18, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119, 6120. RCRA's imminent hazard authority and common law injunction actions did not provide sufficient tools to compel needed cleanups. Consequently, in 1980, Congress enacted CERCLA to fill in the gaps by facilitating the selection, implementation, and funding of appropriate cleanup plans for hazardous waste sites.

CERCLA makes the parties responsible for the contamination strictly liable for the full costs of the cleanup. 42 U.S.C. §§ 9605(a)(8), 9607, 9611(a)(1). It authorizes the federal government to clean up hazardous waste sites, utilizing funds from the Hazardous Substance Superfund for the sites posing the greatest risk to human health and the environment. *Id.* § 9604(a). The federal government may

pursue short-term response actions, known as removal actions, which are intended to stabilize the hazardous substances on an emergency basis, and long-term response actions, known as remedial actions, which are designed to achieve a permanent remedy. *Id.* § 9601(23)-(24).[1]

CERCLA's substantive standards focus on the end result of the cleanup activities. Thus, CERCLA mandates that any remedial action "shall require, at the completion of the remedial action, a level or standard of control for [] hazardous substance[s] . . . which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation" under federal environmental laws, including RCRA, and under state environmental laws that are more stringent than applicable federal requirements. *Id.* § 9621(d)(2).

Although CERCLA dictates how clean a site must be at the end of the cleanup, it does not establish requirements to ensure that the cleanup is conducted in a manner that does not endanger public health. It leaves that task to existing regulatory schemes, such as RCRA. Thus, CERCLA contains only a limited exemption from federal, state, or local permit requirements for the portion of a CERCLA response action conducted entirely onsite. *Id.* § 9621(e)(1). There is no comparable exemption from RCRA performance standards or from other state and federal safeguards against hazards from the cleanup itself.

Other CERCLA provisions make clear Congress's intent *not* to override RCRA and other statutory schemes. Thus, CERCLA's savings clause provides that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous

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[1]The federal government may also issue administrative orders compelling the private cleanup of a facility, 42 U.S.C. § 9606(a), but no such orders are at issue in this case.

substances or other pollutants or contaminants." *Id.* § 9652(d). Similarly, CERCLA spells out its relationship to other law, stating that "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." *Id.* § 9614(a). CERCLA also "does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h)," discussed below, and with respect to the CERCLA provision on statutes of limitations for state law damages actions. *Id.* § 9659(h), *see id.* § 9658.

CERCLA permits citizens' suits challenging violations of any CERCLA standard, regulation, condition, requirement, or order and the failure of federal officers to perform a nondiscretionary duty under CERCLA. *Id.* § 9659(a). Citizens' suits are expressly made subject to CERCLA's timing of review provision, which states:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following.

Id. § 9613(h). Four of the exceptions that follow pertain to enforcement actions to compel a private party to clean up a site or pay penalties or actions to recover or obtain reimbursement or contribution for response costs. *Id.* § 9613(h)(1)-(3), (5). The remaining exception allows citizens' suits "alleging that the removal or remedial action taken

under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter." *Id.* § 9613(h)(4).

By expressly excepting actions brought under 28 U.S.C. § 1332, this postponement of judicial review does not apply to diversity cases. Similarly, by expressly limiting its terms to state laws establishing cleanup standards under section 9621 of CERCLA, section 113(h) is inapplicable to other state laws, and certainly does not extend to claims brought in state court. The conference committee reinforced this point, stating that the timing of review provision "is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants." H.R. Rep. No. 962, 99th Cong., 2d Sess. 224 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276, 3317.

Rather, its principal purpose is to prevent potentially responsible parties "from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA's cleanup activities." H.R. Rep. No. 253(I), 99th Cong., 1st Sess. 266 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2941. Moreover, by postponing litigation over liability and cost issues until EPA initiates litigation, Section 113(h) "ensure[s] both that effective cleanup is not derailed and that private responsible parties get their full day in court to challenge the agency's determination that they are liable for cleanup costs." *Id.*; 42 U.S.C. § 9613(h)(1)-(2), (5).

Section 113(h) also postpones, until after completion of the cleanup, challenges to the response action selected and litigation over whether the end result of the cleanup meets applicable cleanup standards. *See* 42 U.S.C. §§ 9613(h)(4), 9621(d)(2)(A). However, Congress never envisioned that Section 113(h) would have the effect of barring litigation altogether over such claims, even those concerning the

selection of the type of cleanup. To the contrary, Congress made clear that "[a] person's rights to challenge the choice of removal or remedial action *are preserved*, however, and can be exercised . . . [in] a citizens' suit alleging that the removal or remedial action was in violation of any requirement of the Act . . .." H.R. Rep. No. 253(V), 99th Cong., 1st Sess. 25-26 (1985), *reprinted in* U.S. Code Cong. & Admin. News 3124, 3149 (emphasis added); *accord* H.R. Rep. No. 253(I), *supra*, at 267, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2941.

There also is no hint in Section 113(h) or its legislative history that Congress sought to preclude litigation over compliance with RCRA. In contrast, the conference committee indicated that "[l]itigation regarding permits required under applicable Federal laws for facilities that are designed to treat or dispose of hazardous wastes, particularly those from the cleanup of Superfund sites, should be given priority treatment by the courts." H.R. Rep. No. 962, *supra*, at 225, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3318. Therefore, the conference committee wanted litigation concerning RCRA and other permits for hazardous waste facilities treating or disposing of wastes from Superfund sites to be expedited, not postponed, and certainly not eliminated by CERCLA.

II. THE CERCLA CLEANUP OF THE VERTAC SITE

For 35 years, herbicides were manufactured at the Vertac site, and dioxin-containing wastes were produced and stored there. The site is listed on the National Priorities List and ranks eighteenth in severity. 40 C.F.R. pt. 300, App. B. In 1980, EPA and the State of Arkansas brought an enforcement action against the responsible parties, which resulted in the creation of a trust fund for cleanup of the site. *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980). In 1987, the last manufacturer abandoned the site, leaving 28,000 drums of dioxin-contaminated

wastes. EPA then took actions to stabilize the wastes. *United States v. Vertac Chemical Corp.*, 671 F. Supp. 595 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988) (Mem.).

The Arkansas Department of Pollution Control and Ecology ("ADPC&E") thereafter selected incineration as the permanent remedy for disposal of the drums and selected a joint venture known as Vertac Site Contractors to conduct the incineration. ADPC&E negotiated a contract for incineration of the wastes, which required strict compliance with the 99.9999% destruction and removal efficiency standard for dioxin and a 99.99% standard for all other principal organic hazardous constituents.

Vertac Site Contractors has built an incinerator and begun the incineration of the dioxin-containing wastes, which is expected to continue for at least one more year. During 1993, the trust fund was depleted. As a result, EPA decided to complete the incineration as a CERCLA response action, using Superfund money.

III. THE PROCEEDINGS BELOW

In October 1992, petitioners, organizations representing individuals living and working adjacent to and downwind from the Vertac site, many of whom have particular sensitivities to dioxin and other toxic chemicals, brought this case to prevent serious public health harm from the Vertac incineration. The principal health issues are whether the incinerator meets this performance standard and whether its operation presents an imminent health hazard to nearby residents. Of particular concern, when dioxin was accidentally burned in a test burn of a surrogate substance, the surrogate achieved the 99.9999% standard, but the dioxin achieved only a 99.96% destruction and removal efficiency.

Most of petitioners' claims arise under RCRA and its Arkansas counterpart. Thus, petitioners claimed that the

incineration is causing an imminent and substantial endangerment in violation of RCRA, 42 U.S.C. § 6972(a)(2), is violating applicable federal and state regulations governing hazardous waste incineration, is creating harmful emissions in violation of state hazardous waste and air pollution statutes, and is creating a public nuisance in violation of Arkansas common law. The amended complaint asserted jurisdiction pursuant to RCRA's citizens' suit provision, 42 U.S.C. § 6972(a), as well as federal question, diversity, and pendent state law claim jurisdiction.[2]

On October 30, 1992, the District Court for the Eastern District of Arkansas issued a temporary restraining order enjoining the incineration of certain hazardous wastes containing dioxins, although it allowed several days of test burns to go forward. App. 16a-17a. The district court subsequently amended its temporary restraining order to prevent the incineration of other wastes also containing dioxins. Order of February 16, 1993. The court concluded that EPA regulations require a destruction and removal efficiency of 99.9999% to be achieved on dioxin-containing wastes, and that petitioners had demonstrated a probability of succeeding in showing that the incineration of dioxin-containing wastes at the Vertac site violated this regulation. App. 19a. The court certified the legal issue of the meaning of the EPA regulation for interlocutory appeal, and the Eighth Circuit stayed the temporary restraining order pending resolution of that appeal. App. 18a.

The district court held further hearings on five days in March 1993, and issued a preliminary injunction on March 17, 1993, preventing further incineration of dioxin-containing

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[2]Although the complaint also asserted jurisdiction pursuant to CERCLA's citizens' suit provision, 42 U.S.C. § 9659, petitioners' CERCLA claims were not the basis for the district court's orders or the appeal.

wastes at the Vertac site. App. 20a, 30a. In its order, the district court made findings of fact that, *inter alia*:

> Dioxin is an extremely hazardous chemical substance . . . which has been scientifically linked to increased cancer risks, and other possible adverse health effects.
>
> [D]efendants have not, and probably cannot, demonstrate 99.9999% DRE [destruction and removal efficiency] on dioxin.. . .
>
> A DRE was calculated on some dioxin that was accidentally burned. That DRE result was 99.96%.. . . While the difference between 99.9999% and 99.96% may appear in most affairs in life to be insignificant, when it comes to the destruction of extremely hazardous materials such as dioxin, it is critical to public health and safety.
>
> This incineration is being done within a few hundred feet of a well-populated residential area, some of which lies downwind from the southwestwardly winds frequently experienced in central Arkansas.
>
> [T]hings *have* gone wrong at the Vertac site:
>
> > (a) The wastes at Vertac have been classified as "T-wastes" (those containing dioxin) and "D-wastes" (those which were not supposed to contain any dioxin). However, it was

> discovered during a test burn allowed by this Court in previous litigation, that the "D-wastes" did, in fact, contain dioxin and dioxin was accidentally burned.. . .
>
> . . .
>
> (c) During the history of the incinerator, there have been seventy-four (74) "kiln puffs" which is a situation where the air pressure at some point inside the incinerator is greater than that of the outside air.. . . Under normal operation (*i.e.* nothing gone wrong), the incinerator is supposed to be under negative pressure, which . . . would prevent leaks and ameliorate fear of explosion.. . . The evidence of these seventy-four "puffs" removes, in the Court's mind, this previously envisioned safeguard.

App. 22a-26a (citations omitted).

Based on these findings, the court concluded that petitioners had a probability of succeeding in their claim that the incineration of dioxin-containing wastes "may present an imminent and substantial endangerment to health and the environment" in violation of RCRA, 42 U.S.C. § 6972(a)(1)(B), and that "there is a very real risk that humans may be exposed to unacceptable levels of dioxin if the incineration is allowed to continue . . .," thereby demonstrating "potential irreparable harm to human health." App. 27a-29a. Accordingly, the court preliminarily enjoined

further incineration. App. 30a. The Eighth Circuit stayed this order, and expedited briefing on the merits of the injunction. 992 F.2d 145.

On July 14, 1993, the Eighth Circuit held that the district court had no jurisdiction over any of petitioners' claims because Section 113(h) bars any challenges to the incineration of wastes as part of a CERCLA cleanup until the incineration has been completed. App. 11a-12a. Although the court recognized that the injunction was predicated on RCRA violations, it construed the entire case to be a challenge to a CERCLA response action, and thus within the Section 113(h) bar. App. 12a. The court distinguished the Tenth Circuit's holding in *United States v. Colorado*, that Colorado's RCRA enforcement action was not barred by Section 113(h), because that case involved a state's attempt to enforce its hazardous waste requirements, even though the Tenth Circuit acknowledged that Section 113(h) makes no such distinction. The court also read the RCRA citizens' suit provision to preclude petitioners' imminent hazard claim based on the CERCLA response action, even though the response action is creating, rather than ameliorating, the alleged hazard. App. 13a-14a.[3]

The court of appeals reversed the preliminary injunction and directed the district court to dismiss the case for lack of subject matter jurisdiction. App. 15a. Petitioners

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[3]Lacking subject matter jurisdiction, the Eighth Circuit noted that its "inquiry must end." App. 14a. Nevertheless, the court offered its opinion in *dicta* that the 99.9999% efficiency could be demonstrated on a principal organic hazardous constituent that is more difficult to burn than dioxin, rather than on dioxin itself. App. 15a. Although the court considered this an additional reason for its judgment, App. 15a, it did not decide whether the substance tested at the Vertac site was, in fact, more difficult to burn than dioxin, nor did it decide the effect of the district court's finding that the Vertac incinerator, in fact, achieved only a 99.96% efficiency on dioxin itself in an accidental burn of dioxin.

filed a petition for rehearing and a suggestion for rehearing *en banc*, but the court denied both. App. 2a. On remand, the district court dismissed the case pursuant to the Eighth Circuit's mandate. App. 32a-33a.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NEEDED TO RESOLVE THE LOWER COURTS' CONFLICT OVER THE MEANING OF SECTION 113(h)

Review is warranted because the lower courts have adopted conflicting interpretations of Section 113(h). There is a direct circuit conflict on the reviewability of claims that the cleanup of a Superfund site is violating RCRA or other federal and state law requirements. The lower courts are also in disarray over the effect of Section 113(h) on other claims pertaining to, but not directly challenging, a CERCLA response action. This Court's review is needed to clarify the scope of Section 113(h) and guide the lower courts.

The decision below conflicts squarely with *United States v. Colorado*, 990 F.2d 1565 (1993), in which the Tenth Circuit reversed a district court order prohibiting Colorado from enforcing its RCRA authority with respect to a Superfund cleanup of a federal facility. The district court had concluded that Section 113(h) deprived it of jurisdiction over a state RCRA enforcement action with respect to a Superfund response action. Recognizing its obligation to harmonize statutes to avoid a conflict or a repeal of any statutory requirements in the absence of a clear congressional intent to that effect, the Tenth Circuit stated:

> § 9613 does not bar federal courts from reviewing a CERCLA response action prior to completion; rather, it bars federal courts from reviewing any "challenges" to a CERCLA response actions. This is a critical distinction

> because an action by Colorado to enforce the final amended compliance order, issued pursuant to its EPA-delegated RCRA authority, is not a "challenge" to the Army's CERCLA response action. To hold otherwise would require us to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention.

Id. at 1575.

According to the court, Section 113(h) limits federal court jurisdiction over a challenge to a CERCLA response action brought by a state because Section 113(h) does not distinguish between potentially responsible parties -- who it clearly intended to keep out of court until completion of a response action -- and a state. *Id.* at 1576. However, "an action by a state to enforce its hazardous waste laws at a site undergoing a CERCLA response action is not necessarily a challenge to the CERCLA action." *Id.* More particularly, a state action to ensure that a CERCLA cleanup at a federal facility complies with RCRA or its state counterpart is not a challenge to the CERCLA response action itself, especially in light of CERCLA's savings and nonpreemption provisions. *Id.* at 1575-79.

The Tenth Circuit also looked to RCRA's citizens' suit provisions, which spell out in great detail the extent to which CERCLA response actions preclude certain RCRA actions, namely imminent hazard claims, from going forward. *Id.* at 1577-79; 42 U.S.C. § 6972(b)(2). Because RCRA expressly allows some RCRA citizens' suits to proceed with respect to CERCLA sites, even where response actions are underway, and because CERCLA does not "affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other

pollutants or contaminants," *id.* § 9652(d), the court concluded that Congress did not intend to preclude all such actions under CERCLA Section 113(h). 990 F.2d at 1576-77. Thus, there can be no question that the claims asserted by petitioners could be brought in the Tenth Circuit.

In contrast, the Eighth Circuit held that Section 113(h) precludes judicial review of imminent hazard and other RCRA and state law claims that seek to prevent dangerous health risks from the conduct of a Superfund cleanup. The court below read the term "challenge" so broadly that it encompasses RCRA claims and forecloses any federal court action to prevent serious health harm resulting from the cleanup. Such claims are not simply postponed under the Eighth Circuit's construction of Section 113(h); they are eliminated altogether. By reading Section 113(h) to bar litigation of whether the cleanup is being conducted in accordance with admittedly applicable public health standards, the Eighth Circuit has carved out a CERCLA exemption to those standards, including those under RCRA, contrary to CERCLA's savings and preemption provisions.

In its petition for a writ of certiorari in *United States v. Colorado*, the federal government agrees that this Court should resolve the conflict on this question. Thus, the United States has asked this Court to review *Colorado*, in part, "because it conflicts with decisions of other courts of appeals." Petition for a Writ of Certiorari at 16. The petition cites two court of appeals decisions that reached conflicting interpretations of Section 113(h), although it never mentions this case. Petition at 18 (citing *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991), and *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990)). Moreover, in asserting that the Tenth Circuit decision was erroneous, the United States argues that Colorado's RCRA enforcement is a "challenge" to the CERCLA response action because at least parts of the state's compliance order would alter that action or require state approval of it, which is analogous to the Eighth Circuit's

broad construction of the term "challenge." Petition at 21. These portions of the United States' petition in *Colorado* underscore the importance of the issue raised in this case and the conflict among the circuits on this issue.

However, it is quite possible that this Court may decide *Colorado* without resolving the important issue underlying this petition. The United States devotes less than two pages to the Section 113(h) issue. Instead, it frames the question presented to avoid the Section 113(h) issue, and urges as its fundamental ground for reversal an implied repeal or preclusion theory -- namely, that CERCLA's provisions for state participation in the establishment of cleanup standards provide the exclusive means for states to affect CERCLA response actions. Petition at i, 18-20, 22-27. If the Court grants the *Colorado* petition and accepts the government's theory, it would not reach the Section 113(h) issue in *Colorado*, even though the Eighth and Tenth Circuits are split on this issue, and it is plaguing the lower courts.

The Tenth Circuit is not alone in refusing to read the phrase "challenge" to encompass all claims that will have any effect on a CERCLA response action. Other courts have also refused to read Section 113(h) to eradicate independent claims simply because they are related to or may have some effect on a Superfund cleanup. *See, e.g., Alabama v. EPA*, 871 F.2d 1548, 1559 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989) (reviewing claims to the extent they were not solely a challenge to the response action for a Superfund site); *Yslava v. Hughes Aircraft Co.*, Nos. 91-525-TUC-JMR & 92-564-TUC-JMR (D. Ariz. Nov. 17, 1993) (medical monitoring of people exposed to contaminated water from a Superfund site); *Chemical Waste Management Inc. v. EPA*, 673 F. Supp. 1043, 1055 (D. Kan. 1987) (prohibition on

hazardous waste incinerator receiving wastes from CERCLA sites).[4]

On the other hand, a number of courts have followed the Eighth Circuit's broad reading of Section 113(h) to bar all claims related to or that will in any way affect a CERCLA response action. This issue is currently before the Ninth Circuit in an appeal from *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265 (E.D. Wash. 1993) (appeal docket No. 93-35513), which held that claims that discharges of contaminated waters violated the Clean Water Act, and that hazardous releases were not being reported as required by RCRA were barred by Section 113(h) because they arose out of actions taken as part of a CERCLA response action. *See also In re Hanford Nuclear Reservation Litigation*, 780 F. Supp. 1551 (E.D. Wash. 1991) (claim seeking abatement of risks from underground storage tanks at CERCLA site); *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991) (National Historic Preservation Act claim); *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990) (National Environmental Policy Act claim).

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[4]Several courts have also held that constitutional challenges to CERCLA provisions applied to potentially responsible parties in the course of a specific CERCLA response action are not "challenges to a removal or remedial action," but to the statute itself, and hence are not barred by Section 113(h). *See Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (*en banc*) (constitutional challenge to CERCLA lien provisions); *Solid States Circuits Inc. v. EPA*, 812 F.2d 383 (8th Cir. 1987) (constitutional challenge to CERCLA penalty provisions); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986) (same); *but see Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991) (Section 113(h) postpones review of all challenges, including constitutional ones); *South Macomb Disposal Authority v. EPA*, 681 F. Supp. 1244 (E.D. Mich. 1988) (same).

As this discussion demonstrates, Section 113(h) has caused a great deal of confusion in the lower courts when it is applied to cases seeking to ensure that a cleanup is conducted in compliance with applicable public health standards or to claims that will be extinguished if judicial review is postponed until the cleanup is finished. This Court's review is needed to resolve the deep and growing division in the lower courts on the proper construction of Section 113(h) and to ensure that RCRA does not become a dead letter whenever a CERCLA cleanup is involved. Accordingly, the Court should grant this petition, regardless of whether it decides to hear *Colorado*. Alternatively, if it grants the petition in *Colorado*, it should, at a minimum, hold this petition pending resolution of that case.

II. THIS PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW DECIDED ERRONEOUSLY BY THE COURT BELOW.

This case also warrants review because the Eighth Circuit's decision renders RCRA inoperative with respect to the manner in which CERCLA cleanup activities are conducted. Given the public health purposes of both statutes, and CERCLA's express savings clause, the Eighth Circuit clearly erred in depriving citizens of the right to prevent imminent health hazards from CERCLA cleanup actions, without any evidence that Congress intended such an untenable result.

The decision below is predicated on the assumption that every claim connected to a CERCLA response action is a "challenge[]" to that response action. That assumption runs counter to both the plain language of Section 113(h) and other CERCLA and RCRA provisions.

Section 113(h) postpones federal court review of "challenges to removal or remedial action selected under

section 9604." This postponement clearly encompasses liability and cost issues, which may be reviewed by the courts only in post-enforcement or post-cleanup actions specified in other Section 113(h) provisions. 42 U.S.C. § 9613(h)(1)-(3), (5). It also encompasses citizens' suits alleging that a cleanup was in violation of CERCLA requirements. *Id.* § 9613(h)(4). For example, a citizens' suit alleging that a site has not been cleaned up sufficiently to comply with legally applicable or relevant and appropriate requirements must await the completion of the cleanup. This makes sense since CERCLA requires compliance with such cleanup standards supplied by other laws "*at the completion of the remedial action.*" *Id.* § 9621(d)(2)(A). Violations of such standards may be remedied at the completion of the cleanup since additional cleanup activities may be undertaken at that time, just as liability and cost issues can be resolved then. Thus, properly construed, Section 113(h) postpones review, but does not eliminate it altogether, as the title of the provision makes clear.

In contrast, an attempt to ensure that a cleanup will be conducted in compliance with RCRA and other public health standards and will not cause serious harm to public health is not a challenge to the response action; it is a challenge to the violation of those public health standards or more specifically, as here, to the release of a hazardous substance from the Superfund site. The fact that an order requiring compliance with such standards may affect the CERCLA remedy does not bring the case within Section 113(h)'s bar. After all, Section 113(h) covers "challenges to" CERCLA response actions, not any litigation that may have some effect on a CERCLA response action.

Section 113(h) expressly permits some litigation to be brought prior to the completion of the cleanup activities, even if it may affect a CERCLA response action. Thus, diversity claims may still be brought in federal court. 42 U.S.C. § 9613(h). State law claims, other than those pertaining to the degree of cleanup that must be attained,

may also be heard while the cleanup is ongoing. *Id.* As the conference committee made clear, Section 113(h) "is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants." H.R. Rep. No 962, *supra*, at 224, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3317. Congress permitted such litigation to go forward at any time even though it could affect a CERCLA cleanup.[5]

This reading of Section 113(h) is confirmed by other CERCLA and RCRA provisions that specifically address the interrelationship between the two statutory schemes. First, as the Tenth Circuit stressed in *Colorado*, CERCLA expressly does not "affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). Therefore, a Superfund cleanup must comply with RCRA and other statutes protecting public health.

Second, the CERCLA provision requiring that CERCLA cleanups comply with other applicable legal requirements is limited to "cleanup standards" and determining the "degree of cleanup," as the statutory headings confirm. 42 U.S.C. § 9621(d)(2)(A). It does not establish any legal requirements designed to ensure that the cleanup is conducted in a manner that protects public health. RCRA and other legal requirements supply those standards.

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[5]In directing that the entire case, including petitioners' diversity and state law claims, be dismissed, the Eighth Circuit violated the plain language of Section 113(h) and the practice followed by other courts. *See, e.g., Werlein v. United States*, 746 F. Supp. 887, 895, 897 (D. Minn. 1990); *Yslava, supra* at 18; *see also Colorado*, 990 F.2d at 1579 (state can enforce its hazardous waste law in state court).

Third, CERCLA spells out the applicability of RCRA and other permitting requirements in connection with CERCLA response actions, exempting only actions that will not result in any offsite releases of hazardous substances, such as emissions from incineration. 42 U.S.C. § 9621(e)(1). There is no exemption for RCRA standards other than its permitting requirements.

Fourth, the best indication of Congress's intent concerning the viability of RCRA citizens' suits in connection with CERCLA response actions is the language of the citizens' suit provisions. Although there is no mention of RCRA in Section 113(h) or in CERCLA's citizens' suit provisions, RCRA spells out the precise effect of CERCLA response actions on the viability of RCRA citizens' suits. RCRA imposes no limitations on citizens' suits to enforce RCRA's requirements with respect to a CERCLA response action. It does, however, impose discrete limitations on citizens' imminent hazard suits in connection with CERCLA response actions. Citizens' suits are precluded if EPA or a state is taking certain designated actions under CERCLA "in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment." 42 U.S.C. § 6972(b)(2)(B) & (C). In other words, if EPA is taking actions under CERCLA to abate a particular hazard, no citizens' suit may be brought to compel abatement of that same hazard. However, RCRA's preclusion language does not apply to imminent hazard suits seeking to abate a hazard different from the one that is being addressed by the CERCLA action. Thus, an imminent hazard action may still be brought to abate a hazard created (rather than redressed) by the cleanup process.

The express and quite precise restrictions imposed on RCRA citizens' suits contrast with the general language of Section 113(h). There is absolutely no indication that, in drafting and enacting Section 113(h), Congress ever intended to include RCRA citizens' suits within its time bar. In

contrast, it is clear that, in RCRA's citizens' suit provision, Congress resolved that certain citizens' suits could be heard in connection with ongoing CERCLA response actions. For this reason, the Eighth Circuit should have looked to RCRA's citizens' suit provision, not Section 113(h), to determine whether the RCRA claims in this case may be heard. If it had done so, it would have read the two statutes to co-exist and serve their common purpose of ensuring that hazardous waste management and disposal does not harm public health. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974).[6]

Finally, the most significant and clearest error in the Eighth Circuit's decision is that it erroneously converted a provision designed to *postpone* review into one that *precludes* review of petitioners' claims altogether. Nothing in Section 113(h)'s legislative history suggests that Congress sought to eliminate review of any claims. To the contrary, Congress believed that citizens' suits and potentially responsible parties' claims would be "preserved." H.R. Rep. No. 253(V), *supra*, at 25-26, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3149. Tellingly, Section 113(h) is entitled "timing of review," and every reference to it in CERCLA calls it a "timing of review" provision. 42 U.S.C. §§ 9613(h); 9659(a) & (h).

Most cases that have come within Section 113(h)'s bar may be fully remedied by review at the end of the

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[6]Although the Eighth Circuit mentioned RCRA's limitations on imminent hazard suits, it assumed that a RCRA citizens' suit could not be maintained by virtue of Section 113(h) solely because a CERCLA response action is underway at the Vertac site. App. 13a-14a. What the Eighth Circuit should have done, and what some other courts have done, is determine whether the particular lawsuit is barred by the specific terms of RCRA's citizens' suit provision. *See Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1323-24 (7th Cir. 1992); *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (alternative holding).

cleanup process. Thus, questions regarding the adequacy of the cleanup, liability, and costs may be litigated and remedied long after the cleanup is finished. In contrast, the decision below eviscerates judicial review of whether the incineration of hazardous wastes at a Superfund site creates an imminent health hazard or violates applicable public health standards. The only time for judicial review of these claims is during the cleanup. Once the response action has been completed, *i.e.*, the dioxin wastes have all been incinerated, petitioners' claims will be moot, and more critically, the harm will have been done.[7]

In other cases, courts have been troubled by the prospect of denying review altogether, but in no prior case, was that result guaranteed, as it is here, with respect to a substantive claim, let alone one concerning grave harm to public health. *See North Shore Gas Co. v. EPA*, 930 F.2d 1239 (7th Cir. 1991) (assumed CERCLA's review provisions would be read to permit review at a later date); *Cabot Corp. v. EPA*, 677 F. Supp. 823 (E.D. Pa. 1988) (assumed judicial review would be available to prevent irreparable harm from cleanup process, but not for damages claims); *Chemical Waste Management*, 673 F. Supp. at 1055 (refused to read Section 113(h) to eliminate any opportunity to be heard and obtain effective remedy).

Not only did the Tenth Circuit in *Colorado* hold that RCRA retains its viability with respect to CERCLA sites, 990 F.2d at 1575-79, but other Circuits have likewise

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[7]At a hearing before the district court, the government admitted that its reading of Section 113(h) would preclude judicial review even if EPA decided to "take the barrels of dioxin, truck them down to the Arkansas River and dump them in the river." Transcript of Hearing at 49 (July 1, 1993). Such an action would be in clear violation of RCRA, but could not be remedied in the manner intended under RCRA, if review is unavailable until after the dumping has been completed.

assumed that RCRA governs the disposal of hazardous wastes from Superfund sites. Notably, in *Alabama*, the Eleventh Circuit emphasized that the Alabama toxic waste facility that would dispose of wastes from a Superfund site was subject to RCRA and other public health standards. 871 F.2d at 1552-53, 1556, 1559. The government itself argued in *Schalk* that a facility that would incinerate Superfund wastes "would be required to meet regulatory standards to ensure it did not release significant harmful emissions." 900 F.2d at 1094.

In contrast, the Eighth Circuit concluded that CERCLA completely extinguishes RCRA's public health protections, thereby subjecting petitioners to what the district court found to be "unacceptable levels of dioxin" and "irreparable harm to human health." App. 28a. This reading takes Section 113(h) to an untenable extreme. The core purpose of both statutes is to maximize protection of public health, and CERCLA was designed to fill gaps in the RCRA regulatory process; not to create new gaps that had previously been filled by RCRA. It defies logic to conclude, as the Eighth Circuit did, that Congress wanted its "timing of review" provision to eviscerate RCRA and other standards that protect the public from imminent hazards from toxic waste disposal. Yet that is the consequence of the Eighth Circuit's ruling.

CONCLUSION

For these reasons, the petition should be granted, and the case should be argued along with any argument held in *United States v. Colorado*, No. 93-786.

Respectfully submitted,

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January 7, 1994

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

NO. 93-1720

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER; MOTHERS AIR WATCH,

PLAINTIFFS-APPELLEES,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR;

DEFENDANT,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL BROWNER, ADMINISTRATOR;

DEFENDANT-APPELLANT,

VERTAC SITE CONTRACTORS; ARKANSAS ATTORNEY GENERAL,

DEFENDANT.

NO. 93-1765

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER; MOTHERS AIR WATCH,

PLAINTIFFS-APPELLEES,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL BROWNER, ADMINISTRATOR;

DEFENDANT,

VERTAC SITE CONTRACTORS;

DEFENDANT-APPELLANT,

ARKANSAS ATTORNEY GENERAL,

DEFENDANT.

NO. 93-1769

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER; MOTHERS AIR WATCH,

PLAINTIFFS-APPELLEES,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR;
DEFENDANT-APPELLANT,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL BROWNER, ADMINISTRATOR; VERTAC SITE CONTRACTORS; ARKANSAS ATTORNEY GENERAL;
DEFENDANTS.

Appeals from the
United States District Court for the
Eastern District of Arkansas.

Submitted June 7, 1993.
Decided July 14, 1993.

Rehearing and Suggestion for Rehearing *En Banc* Denied Aug. 30, 1993.

Before McMILLIAN, JOHN R. GIBSON, and WOLLMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Environmental Protection Agency, The Arkansas Department of Pollution Control and Ecology, and Vertac Site Contractors appeal from a preliminary injunction entered on March 17, 1993, prohibiting Vertac Site Contractors from incinerating any drummed wastes. We reverse the grant of a preliminary injunction, and remand with directions to dismiss the case for lack of subject matter jurisdiction.

A variety of companies operated the Vertac site[1] as a herbicide and pesticide production facility from 1948 to 1987. As part of the manufacturing process, the companies produced wastes containing dioxin, put the waste in drums, and stored it at the site. In 1987, the last manufacturer abandoned the site, leaving about 28,000 drums of two types of dioxin contaminated herbicide waste, 2,4-D waste ("D waste") and 2,4,5-T waste ("T waste"). The EPA initiated an immediate removal action under The Comprehensive Environmental Response, Compensation, and Liability Act of 1980.[2] The EPA overpacked the drums and placed them in temporary storage to mitigate hazards the deteriorating drums posed.

The Arkansas Department of Pollution Control and Ecology negotiated and signed a contract for the incineration of the drummed wastes with MRK, Inc. on July 11, 1989. MRK subsequently assigned the contract to Vertac Site Contractors, a joint venture comprised of MRK and MK Environmental Services, to conduct the incineration activities. To pay for the project, the State used money from a trust fund created as a result of litigation against the manufacturer by the United States.

The EPA conducted an Engineering Evaluation/Cost Analysis for the site, and determined that it would assist the State in the incineration of the drums by maintaining the drummed waste, conducting offsite air monitoring around the site, handling and transporting the drums for incineration, and disposing of the incinerator ash.

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[1]The EPA first listed the site on its National Priorities List in 1979, 40 C.F.R. Pt. 300, App. B (1984), and the site currently ranks number eighteen. 40 C.F.R. Pt. 300 App. B (1992).

[2]42 U.S.C. § 9604, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") (codified as amended at 42 U.S.C. ss 9601-9675) (West 1983 & Supp.1992) and 26 U.S.C. § 9507 (West Supp.1992)).

To burn the waste, Vertac built a rotating kiln incinerator. On January 2, 1992, the Arkansas Department of Pollution Control and Ecology certified that Vertac had demonstrated its ability to meet state and federal regulatory requirements, but imposed numerous conditions regarding the incinerator's operation. Of significance to this case is EPA regulation 40 C.F.R. § 264.343(a)(2) (1992), which requires that an incinerator burning certain hazardous wastes (including dioxin) achieve a destruction and removal efficiency (DRE) of 99.9999% (the "six nines" requirement), with the performance to be demonstrated on surrogate constituents more difficult to incinerate than dioxin.[3]

Greenpeace and the National Toxins Campaign prepared a report criticizing the State's approval of the incinerator and the EPA's air monitoring. The EPA Region VI reviewed this report, and told the Arkansas Department of Pollution Control and Ecology that Vertac complied with the six nines DRE requirement. In so concluding, the EPA relied on the results of three trial burns that used a compound that is more difficult to destroy than dioxin. The Arkansas

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[3]40 C.F.R. s 264.343(a)(2) provides:

> An incinerator burning hazardous wastes FO20, FO21, FO22, FO23, FO26, or FO27 must achieve a destruction and removal efficiency (DRE) of 99.9999% for each principal organic hazardous constituent (POHC) designated (under s 264.342) in its permit. This performance must be demonstrated on POHCs that are more difficult to incinerate than tetra-, penta-, and hexachlorodibenzo-p-dioxins and dibenzofurans....

Department of Pollution Control and Ecology, in consultation with the EPA, imposed carbon monoxide and hydrocarbon emission limits to minimize emissions from the incinerator. The EPA has since conducted continuous air quality monitoring at the site during all times when hazardous wastes have been incinerated. The EPA also prepared a risk assessment utilizing the air monitoring data, and concluded that the excess probability of cancer associated with the incineration of dioxin was within the acceptable range. On September 28, 1992, the EPA Regional Administrator for EPA Region VI requested approval of a federal removal action and an exemption from the statutory $2,000,000 ceiling increase and one year time limit for removal actions under CERCLA, 42 U.S.C. § 9604(c)(1)(C). Because the state's trust funds were insufficient to complete the incineration, the Regional Administrator determined that an immediate federal removal action was necessary to complete the incineration. The memorandum documented that CERCLA section 104(c)(1)(C), which authorizes spending over the $2,000,000 limit, covered the activity. 42 U.S.C. § 9604(c)(1)(C). The memorandum emphasized in several statements the risk of exposure to nearby populations by the threat of release, fire, or explosion should the wastes not be incinerated.

On October 28, 1992, the Arkansas Peace Center and other groups[4] filed a complaint and a motion for a temporary restraining order and preliminary injunction seeking to enjoin the State, the EPA, and Vertac from incinerating the drummed waste at the site, alleging that Vertac failed to demonstrate a six nines DRE for dioxin. Two days later, the

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[4]Environmental Health Association of Arkansas, Jacksonville Mothers' and Children's Defense Fund, Veterans of America, Arkansas State Chapter, and Mothers Air Watch. We will refer to these groups as simply Arkansas Peace Center for purposes of this appeal.

district court granted in part the groups' motion for a temporary restraining order. *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, No. LR-C-92-684, Order (E.D.Ark. Oct. 30, 1992). The order allowed two already scheduled test burns of the T-wastes to go forward, but enjoined any further burning until the court could conduct a hearing on the preliminary injunction. *Id.* The court did not enjoin the burning of D-wastes.

On December 24, 1992, the EPA filed a motion to dismiss, raising a number of issues, including lack of subject matter jurisdiction under CERCLA section 113(h). 42 U.S.C. § 9613(h). The district court has not ruled on this motion.

On January 5, 1993, the district court entered an order requiring the parties to address "whether a destruction removal efficiency (DRE) test for dioxin is required under the circumstances of this case." The parties submitted briefs, and the district court held a hearing on February 12, 1993. At that hearing, the district court stated that it doubted it had jurisdiction to consider anything other than defendants' compliance with EPA's regulations. The court stated that although the regulation did not require a demonstration of six nines DRE on dioxin, the purpose of the six nines rule was to insure that dioxins were being destroyed at that rate. The court continued the injunction and also extended the injunction to prohibit the incineration of D-wastes. On February 16, 1993, the district court amended its temporary restraining order, extending the temporary restraining order until the conclusion of the hearing for preliminary injunction. *Arkansas Peace Ctr. v. Vertac Site Contractors*, No. LR-C-92-684, Order at 1-2, 1993 WL 95658 (E.D.Ark. Feb. 16, 1993). The district court found that the incinerator performance regulation required the showing of a 99.9999% destruction and removal efficiency for dioxin, not a surrogate chemical substance or Principal Organic Hazardous Constituent (POHC). *Id.* at 2. The court ruled that the burning of dioxin containing wastes violated EPA

regulations, and that a violation of regulations tips the scale heavily toward a determination that potential irreparable harm to plaintiffs outweighs the potential harm to defendants. *Id.* The court also denied defense motions for stay pending appeal and certified the case for interlocutory appeal under 28 U.S.C.A. § 1292(b) (West Supp.1993). *Id.* at 1. Vertac, the EPA, and the Arkansas Department of Pollution Control and Ecology filed a petition for permission to appeal and motions for stay pending appeal with this court.

On February 25, 1993, we granted a temporary stay of the February 16, 1993, amended temporary restraining order, and later entered a stay pending appeal of the amended temporary restraining order. *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, No. 93-1447, slip op. at 5 (8th Cir. Mar. 2, 1993). We granted the motions for interlocutory appeal, expedited and consolidated the interlocutory appeals, and set the case for oral argument on March 17, 1993. *Id.* at 4-5.

On March 17, 1993, the district court entered a preliminary injunction barring all incineration of drums of hazardous wastes that had not already been shredded in preparation for incineration. *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, No. LR-C-92-684, Order at 12-13, 1993 WL 95654 (E.D.Ark. Mar. 17, 1993). The court found that Arkansas Peace Center had shown a probability of success on the merits because "defendants have not demonstrated that the incinerator can achieve a 99.9999% DRE on dioxin itself as is required by 40 C.F.R. 264.343." *Id.* at 11.

After oral arguments on March 17, 1993, we entered a temporary stay of the preliminary injunction and requested further briefing on whether to continue the stay pending appeal of the preliminary injunction. On April 2, 1993, we issued an order granting the stay pending appeal. *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 992 F.2d 145, 147 (8th Cir.1993). We expedited

briefing on the merits of the preliminary injunction, and heard oral argument on June 7, 1993.

At oral argument, the EPA informed us that the State contract for incineration of the Vertac wastes had been terminated because the Trust Fund had been depleted. The EPA informed us that the EPA and Vertac were finalizing a new contract for the continued incineration of the waste on that day. On June 14, 1993, Vertac moved for permission to file a supplemental joint appendix containing the contract documents.[5] These documents show that Vertac and URS Construction, Inc.-Colorado signed a contract on June 7, 1993, incorporating by reference a subcontract between URS and Vertac. The subcontract recited that URS is the prime contractor to provide professional services for the EPA, and under the terms of the prime contract, URS is to provide "program management and technical environmental services ... for the incineration of hazardous waste materials at the Vertac site in Jacksonville, Arkansas."[6]

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[5]Although the Arkansas Peace Center opposes this motion, we grant the motion to file the supplemental appendix.

[6]On June 8, 1993, URS directed to MK-Environmental Services Division, Managing Partner of Vertac, a notice to proceed with the June 7, 1993 contract, with copies sent to EPA representatives. The subcontract recited that at the time the agreement became effective, approximately 15,947 of the original 28,440 drums requiring incineration remained at the Vertac sites. The subcontract further confirmed that the trust funds in the Arkansas Department of Pollution Control and Ecology contract were expected to be depleted by May 1993. The contract provided that Vertac would perform thermal destruction operations and planning as defined by the Destruction and Removal Efficiency standards set forth in 40 C.F.R. 264 Subpart O. The contract recited that the EPA considered the "Waste at the Vertac site to pose an imminent and substantial endangerment to human health and the environment." Because of that urgency, the subcontract

(continued...)

We review a district court's grant or denial of a preliminary injunction "for abuse of discretion or misplaced reliance on an erroneous legal premise." *Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992). The EPA argues that we should reverse the preliminary injunction based on two errors of law made by the district court. First, the EPA argues that the district court failed to recognize that the action is barred under CERCLA section 113(h). 42 U.S.C. § 9613(h)(4). Second, the EPA contends that the district court misinterpreted 40 C.F.R. § 264.343(a)(2) and that the regulation does not require demonstration of six nines DRE on dioxin itself; but instead, the operator must demonstrate such performance by measurement of a surrogate principal organic hazardous constituent more difficult to incinerate than dioxin.

Section 113(h) of CERCLA states: "No Federal court shall have jurisdiction under Federal law ... to review any challenges to removal or remedial action selected under section 9604 of this title, ... in any action except one of the following...." 42 U.S.C. § 9613(h). Section 113(h)(4) permits citizen suits challenging removal and remedial actions only if they allege:

> that the removal or remedial action taken under section 9604 ... or secured under section 9606 ... was in violation of any requirement of this [Act]. Such an action may not be brought with regard to a removal

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[6](...continued)
stated that EPA was conducting the incineration activity as a "time-critical emergency removal action" requiring that Vertac be prepared to begin drum incineration upon URS's written notice or no later than the date of conclusion of the Arkansas contract. The subcontract represented that the target incineration completion date was 17.81 months, or 542 calendar days, following the issuance of a notice to proceed.

> where a remedial action is to be undertaken at the site.

42 U.S.C. § 9613(h)(4).

The EPA states that usage of the past tense in this section shows Congress' clear intent that the removal action be completed before suit may be filed, and that the district court has no subject matter jurisdiction over challenges to the decision to incinerate the drummed waste as part of a CERCLA cleanup until the action has been "taken" or "secured" -- in other words, completed.

The EPA points out that the Seventh and Eleventh Circuits have ruled that there is no subject matter jurisdiction in circumstances akin to those here. In *Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548 (11th Cir.1989), cert. denied, 493 U.S. 991, 110 S.Ct. 538, 107 L.Ed.2d 535 (1990), the Eleventh Circuit held that the plain language of section 113(h) bars suit until a remedial action is actually completed. *Id.* at 1557. In that case, the citizen group challenged the EPA's failure to provide them with notice and a hearing before choosing the appropriate remedial action for the site. *Id.* at 1554. The court held that section 113(h)(4) barred the claim because the citizen group challenged the implementation of the remedial plan. *Id.* at 1558.

The Seventh Circuit similarly held that section 113(h) barred private citizens from bringing suit challenging a consent decree between the EPA and a responsible party for failing to prepare an environmental impact statement in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321- 4347 (1988). Schalk v. Reilly, 900 F.2d 1091, 1095 (7th Cir.), cert. denied, 498 U.S. 981, 111 S.Ct. 509, 112 L.Ed.2d 521 (1990). The court rejected the citizens' argument that they were not challenging the remedial action, stating that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays

Congress sought to avoid by passage of the statute." *Id.* at 1097. Other courts, including this court, have also dismissed suits by potentially responsible parties challenging remedial actions for lack of subject matter jurisdiction. See, e.g., *North Shore Gas Co. v. Environmental Protection Agency*, 930 F.2d 1239, 1244 (7th Cir.1991) (barring challenge under Resource Conservation and Recovery Act and National Environmental Policy Act to remedial action under section 113(h)); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1388 (5th Cir.1989); *Solid State Circuits, Inc. v. United States Environmental Protection Agency*, 812 F.2d 383, 386 n. 1 (8th Cir.1987).

The Arkansas Peace Center, in rejoinder, argues that the district court based its preliminary injunction on two of its claims, both of which were brought under the RCRA, 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp.1992), and that it is not challenging the removal action. The Arkansas Peace Center argues that under 42 U.S.C. § 6972(b)(1)(B), it is not precluded from bringing suit based on a violation of a specific requirement, such as its claim that the EPA, the State, and Vertac are in violation of the destruction and removal efficiency requirement of 42 U.S.C. § 6924(o) and 40 C.F.R. § 264.343(a). The Center also contends that section 113(h) does not apply because its challenge is to a State proposed incineration action under state law, and it is not challenging a federal removal action.

The Arkansas Peace Center's claims, although couched in terms of a RCRA violation, challenge a removal action. Other courts have consistently held that challenges to remedial actions based on violations of other statutes, including RCRA, are barred under section 113(h). See *North Shore Gas*, 930 F.2d at 1244; *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1024 (3d Cir.1991) (holding that the district court lacks jurisdiction to consider claims under the National Historic Preservation Act, or any other statute, that would interfere with the EPA's clean-up activities on a Superfund site).

The Arkansas Peace Center points to a recent Tenth Circuit case, *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), to support its argument that a RCRA enforcement suit is not a challenge to a CERCLA response action, and therefore, not barred under section 113(h). The Tenth Circuit case, however, involved a state's attempt to enforce its hazardous waste requirements at a federal facility where a CERCLA response action was underway. *Id.* at 1577. The Tenth Circuit held that the state's suit was not barred under section 113(h). *Id.* at 1576. In so ruling, the court relied on 42 U.S.C. § 9614(a), which provides that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within [the] State." *Id.* The Tenth Circuit limited its holding to an action brought by a state, and distinguished Schalk on the ground that Schalk was a citizen action. *Id.* at 1576-77. In spite of *United States v. Colorado*, Arkansas Peace Center is met with the plain wording of section 113(h).

The Arkansas Peace Center also argues that its suit is authorized under 42 U.S.C. § 6972(a)(1)(B). The Center explains that the imminent endangerment claim that it alleges is the incineration itself, not the CERCLA section 104 response action. The citizen suit provision the Arkansas Peace Center cites expressly proscribes citizen suits when either the EPA or a state is actually engaged in a CERCLA removal action. 42 U.S.C. § 6972(b)(2)(B)(ii), (b)(2)(C)(ii). The Center's argument that these prohibitions do not apply because this is not a removal action, and that there is no administrative record to support the fact that the incineration is part of a CERCLA section 104 removal action, is simply contrary to the record. The EPA considered and approved the drum waste incineration as part of a section 104 removal action. The Engineering Evaluation/Cost Analysis for the Site stated: "The scope of the overall removal action at the Vertac site is to destroy through incineration wastes currently stored in drums on the site." The September 28, 1992,

memorandum, requesting a removal action ceiling increase and exemption from the statutory $2,000,000 limit for the Site, stated that the remaining drums at the site "present an imminent and substantial danger to the public health, welfare, and the environment," and that "an immediate federal removal action is necessary to continue and complete the destruction of the drummed hazardous wastes." This exemption is authorized under CERCLA section 104. 42 U.S.C. § 9604(c)(1)(C). The memorandum also stated that the Vertac project meets the criteria for exceeding the $2,000,000 ceiling limit for removal actions, and that federal funds are required "to complete the destruction of the remaining drummed dioxin wastes by providing federal funds for onsite incineration of the wastes." Finally, the EPA's taking over the responsibility and funding for the incineration as shown in the June 7, 1993, contract answers the Center's argument that this is a state, not a federal removal action.[7]

Having concluded that we lack subject matter jurisdiction, our inquiry must end. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981).

Nevertheless, if we were free to consider the merits of this appeal, we would entertain no doubt that the district court erred in its reading of 40 C.F.R. § 264.343. The district court stated in its order dictated from the bench: "I agree with the Defendants that on its face the regulation does not require a demonstration of six nine DRE on dioxin," but then added that the regulation could "have no other rational basis or purpose than to insure that you are getting at least that on dioxin."

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[7]The EPA also argues that the Center's CERCLA claims do not comply with the sixty-day notice requirement of CERCLA section 310(d)(1). *See* 42 U.S.C. § 9659(d)(1). In light of our holding that we have no subject matter jurisdiction, we need not reach this issue.

The language of the regulation is specific in stating that with respect to the six nines DRE for each principal organic hazardous constituent "this performance must be demonstrated on POHC's that are more difficult to incinerate than [dioxins]." 40 C.F.R. § 264.343(a)(2). If there was any doubt as to this meaning, the EPA's notice of amendment of regulations made clear that it was rejecting the proposal to require trial burns on dioxin rather than on a more difficult to incinerate surrogate. *See* 50 Fed.Reg. 1978, 1991 (1985). The EPA reasoned that determining compliance with the requirement of a six nines DRE on dioxin would be difficult, if not impossible, without using surrogates because concentrations of dioxin are too low to find measurable amounts in the stack gas and public health considerations preclude "spiking" the wastes with higher concentrations. *Id.* This would be an additional reason for the judgment we now enter.

We conclude that this case is barred under section 113(h) of CERCLA. We reverse the preliminary injunction order, and remand to the district court with directions to dismiss the case for lack of subject matter jurisdiction.[8]

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[8]Arkansas Peace Center filed an additional motion for temporary restraining order and preliminary injunction on June 18, 1993. In response to a petition for writ of prohibition, we ordered that the district court first decide the jurisdictional issues before proceeding to consider the motion. *In re Vertac Site Contractors*, No. 93-2641, Order at 2 (8th Cir. June 30, 1993). In this opinion we do not consider whether the new motion of June 18 presents any issue with respect to jurisdiction other than those that we deal with today. We will reach that issue when the record has been developed.

NO. LR-C-92-684
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' DEFENSE FUND; VIETNAM VETERANS OF AMERICA ARKANSAS STATE CHAPTER; and MOTHERS AIR WATCH,

PLAINTIFFS,

VS.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WILLIAM H. REILLY, ADMINISTRATOR; and VERTAC SITE CONTRACTORS,

DEFENDANTS.

TEMPORARY RESTRAINING ORDER

Pursuant to the hearing held on October 29, 1992, on plaintiff's motion for temporary restraining order, the Court finds that the motion should be granted in part and denied in part. Specifically, the motion is denied with respect to enjoining the three-day burn of T waste, being conducted October 29, 30, and 31, 1992, and the subsequent two-day burn of T waste, presently scheduled for November 9 and 10, 1992. The motion for temporary restraining order is granted with respect to any further burning of T waste, beyond the two burns presently scheduled, until such time as

the results from the three-day and two-day burns have been collected and made known and the Court is able to conduct a preliminary injunction hearing. Defendants' motion to require the posting of a bond is denied. The Court orders that defendants immediately report any indications that destruction of less the 99.9999 efficiency is being experienced, and in that event, the Court orders that the burning be stopped immediately.

It is, therefore, ORDERED that plaintiffs' motion for temporary restraining order is granted in part and denied in part and defendants' motion to require the posting of a bond is denied.

Dated this 30th day of October, 1992.

/s/ Stephen M. Reasoner
United States District Judge

NO. LR-C-92-684
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS PEACE CENTER, *ET AL.*,
PLAINTIFFS,

vs.

VERTAC SITE CONTRACTORS (Morrison Knudsen Corporation and MRK Incineration Company, a joint venture), *ET AL.*,
DEFENDANTS.

AMENDED TEMPORARY RESTRAINING ORDER

Pursuant to the findings of the Court stated from the bench at the conclusion of the hearing held on February 12, 1993,[1] the temporary restraining order is enlarged and extended until the conclusion of the hearing for preliminary injunction. That hearing is hereby set to begin Thursday, March 4, 1993.

Further, the Court finds that the issue before the Court in the hearing on February 12, 1993, involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

In view of the Court's opinion that burning of dioxin-containing wastes violates EPA regulations, the Court will not alter its original finding that plaintiffs should not be

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[1] Whether EPA regulations require a destruction and removal efficiency of 99.9999% to be achieved on dioxin-containing wastes.

required to post a bond.

As to the hearing for preliminary injunction, the Court finds that plaintiffs have demonstrated, at the very least, a prima facie case for the issuance of a preliminary injunction.

The regulation in question has the underlying purpose of protecting the public interest itself. Furthermore, violation of the regulation tips the scales heavily toward a determination that the potential irreparable harm to plaintiffs outweighs the potential harm to defendants. Also, given the ruling that the regulation does indeed require a 99.9999% destruction and removal efficiency for dioxin wastes, plaintiffs have demonstrated a probability of success on the merits. For these reasons, the Court is of the opinion that defendants should have the burden of going forward with evidence showing that a preliminary injunction is not warranted and that they should be allowed to burn dioxin-containing wastes in violation of the regulation.

Also before the Court is Separate Defendant Vertac Site Contractors (Morrison Knudsen Corporation and MRK Incineration Company, a Joint Venture), Motion to Stay Pending Appeal. Defendant Vertac asks this Court to stay its order granting a temporary restraining order while an interlocutory appeal is pending. Due to defendant's admission at the hearing that the 2,4,-D drums of waste, as well as the drums of 2,4,5,-T waste, contain detectable levels of dioxin, the Court finds that it cannot grant defendant's motion, and it is therefore denied.

IT IS SO ORDERED this 16th day of February, 1993.

/s/ Stephen M. Reasoner
United States District Judge

NO. LR-C-92-684
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA ARKANSAS STATE CHAPTER; and MOTHERS AIR WATCH,

PLAINTIFFS,

vs.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL M. BROWNER, ADMINISTRATOR; VERTAC SITE CONTRACTORS; and ARKANSAS ATTORNEY GENERAL, WINSTON BRYANT,

DEFENDANTS.

ORDER

Presently before the Court is plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (# 2). Responses have been received, and hearings were held on October 29, 1992; February 12, 1993; March 4-5, 1993; March 11-12, 1993; and March 15, 1993.

I. FACTS AND PROCEDURAL HISTORY

Vertac Site Contractors operates an incineration facility in Jacksonville, Arkansas. This facility has been approved by the Arkansas Department of Pollution, Control and Ecology, and the Environmental Protection Agency to conduct a clean-up of wastes that were stored on the site. These wastes contain certain materials, such as dioxin, that force their characterization as F-listed wastes. 40 C.F.R. § 261.31.

After the October 29, 1992, hearing in Batesville, the Court issued a Temporary Restraining Order (# 8) which allowed defendants to conduct a test burn of the 2,4,5-T waste. However, the Court held that no further burning of 2,4,5-T waste would be allowed pending a hearing on the preliminary injunction.

The hearing on February 12, 1993, was held to determine the legal issue of whether a 99.9999% destruction removal efficiency (DRE) must be achieved on dioxin itself. After the Court ruled the regulations require that it must be so demonstrated and expanded the temporary restraining order to prohibit the burning of any wastes containing dioxin,[1] defendant Vertac Site Contractors instigated an interlocutory appeal.[2] The Eighth Circuit Court of Appeals then stayed this Court's temporary restraining order pending appeal. *Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology*, No. 93-1447 slip op. (8th

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[1]Principally, this extended the October 29, 1992, Temporary Restraining Order to include the 2,4-D waste as well as the 2,4,5-T waste.

[2]The Court complied with defendants' request for the necessary language under 28 U.S.C. § 1292(b) and certified the issue of whether EPA regulations require a destruction and removal efficiency of 99.9999% to be achieved on dioxin-containing wastes for interlocutory appeal.

Cir. March 2, 1993). Also, the Eighth Circuit expressed in its order that it wished the district court to continue with its scheduled hearings because "the findings and conclusions made following these hearings will materially affect the expedited appeal we have scheduled. The district court is requested to transmit its findings and conclusions to this court as soon as they have been made." *Id.* at 6.

In the hearings beginning on March 4, 1993, and concluding the day before yesterday, the Court shifted the burden of going forward to defendants to show that despite their noncompliance with EPA regulations, they should be allowed to proceed with the incineration of dioxin-containing wastes. The decision to shift the burden was based on the Court's ruling at the February 12, 1993, hearing and the fact that a 99.9999% DRE for dioxin had not been represented as having been achieved. During the hearings held in March, the Court heard testimony concerning the various factors required in *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir.1981), for the issuance of a preliminary injunction.

II. FINDINGS OF FACT

1. Dioxin is an extremely hazardous chemical substance (*See*, PLAINTIFFS' EXHIBIT # 83 at 5.1, last sentence, second paragraph) which has been scientifically linked to increased cancer risks, and other possible adverse health effects. *See*, PLAINTIFFS' EXHIBIT # 92.

2. Due to its hazardous nature, the Environmental Protection Agency (EPA) drafted regulations which placed dioxin in a category of dangerous substances that must be destroyed by incineration to a level of 99.9999% destruction removal efficiency (DRE) rather than the standard for hazardous wastes of 99.99% DRE. 40 C.F.R. s 264.343(a)(1)-(2).

3. In view of the above, the Court cannot accept the attempts by EPA and the other defendants to suggest through witnesses that dioxin's only known danger is causing a skin condition known as chloracne. In fact, EPA characterizes dioxin as a B-2 carcinogen because it has determined that it is probably carcinogenic to humans. Tr. at 293.

4. In addition to the regulation, the contract between the Arkansas Department of Pollution, Control and Ecology (ADPC & E) and defendant Vertac Site Contractors (VSC) contains a specification for 99.9999% DRE on dioxin, not just upon the principal organic hazardous constituent (POHC) of hexachlorabenzene. *See*, PLAINTIFFS' EXHIBIT 16 at D-8. The Court cannot accept the contract interpretation of defendant Randall Mathis that the specifications were not part of the contract. Further, EPA made this statement in a document entitled "Proposed Exclusion from RCRA Coverage of Vertac Site Wastes":

> In 1985, a series of incineration experiments were performed using wastes from the Vertac site at the EPA Combustion Research Facility (CRF) in Jefferson, Arkansas. The primary objective of the tests was to evaluate the treatability of the waste generated from the 2,4,5-T manufacturing process. The results of the tests indicated that incineration is capable of achieving 99.9999 percent destruction removal efficiency for 2,3,7,8, tetracholorodibenzo-p-dioxin (TCDD) as required by 40 C.F.R. 264.343, making the incineration of the waste a viable treatment alternative.

See, PLAINTIFFS' EXHIBIT # 90 at 220 (emphasis added).

5. From the proof at the hearing, the Court must conclude, that defendants have not, and probably cannot, demonstrate 99.9999% DRE on dioxin. In October, the Court allowed a test burn during which the defendants could

have attempted to prove such DRE on dioxin, but chose not to do so.

6. A DRE was calculated on some dioxin that was accidentally burned. That DRE result was 99.96%. Indeed, various documents by EPA appear to concede that 99.9999% DRE cannot be achieved on dioxin when it is present in low concentrations. While the difference between 99.9999% and 99.96% may appear in most affairs of life to be insignificant, when it comes to the destruction of extremely hazardous materials such as dioxin, it is critical to public health and safety.

7. Testimony suggested that dioxin may be reforming in the stack as a product of incomplete combustion (PIC). This has been offered as an explanation of why 99.9999% DRE cannot be achieved on dioxin itself. However, whether the calculation of less than 99.9999% DRE is the result of a failure to destroy dioxin in the waste feed or the result of the reformation of dioxin in the stack, the ultimate effect is the same, i.e., what comes out of the stack will be more than .0001% of the dioxin in the waste feed. Additionally, EPA expert Barry Dellinger testified that a 99.9999% DRE cannot be achieved if PICs are considered in the calculations. TR. 526-27. Also, ADPC & E has stated that the requisite 99.9999% DRE calculation would include dioxins formed as PICs. *See*, PLAINTIFFS' EXHIBIT # 4 at 21.

8. In addition to 2,3,7,8 TCDD, the most dangerous of the dioxins, the Vertac waste contains other congeners and isomers of dioxins and furans which, while not as dangerous, may nonetheless present significant health hazards.

9. This incineration is being done within a few hundred feet of a well-populated residential area, some of which lies downwind from the southwestwardly winds frequently experienced in central Arkansas.

10. Defendants did put on testimony of operational safe-guards and "risk assessment" studies that tended to demonstrate that the risks from exposure to dioxin released

from the incinerator are small. However, all of these studies and opinions were based upon the premise that nothing would go wrong during the operation. The Court is not comfortable in accepting that premise because things *have* gone wrong at the Vertac site:

> (a.) The wastes at Vertac have been classified as "T-wastes" (those containing dioxin) and "D-wastes" (those which were not supposed to contain any dioxin). However, it was discovered during a test burn allowed by this Court in previous litigation (*National Toxic's Campaign, et al. v. Arkansas Department of Pollution Control and Ecology*, No. LR-C-91-194 (E.D.Ark., June 28, 1991)), that the "D-wastes" did, in fact, contain dioxin and that dioxin was accidentally burned. This came as a surprise to Randall Mathis, Administrator of the Arkansas Department of Pollution Control and Ecology, according to his testimony in this case, and it came as a surprise to this judge. The Eighth Circuit Court of Appeals in its March 2, 1993 order staying this Court's temporary restraining order made reference to this Court's order in *National Toxic's Campaign* wherein this Court recognized that "something must be done about the situation." However, what the Eighth Circuit panel probably could not have known, because this Court did not spell it out as it should have in that order, was that this Court, as did Mr. Mathis, thought that the 360-hour test burn that was allowed then would involve the burning of no dioxin-contaminated wastes.
>
> (b.) The incineration process is producing dioxin contaminated ash in a volume almost as great as the waste being destroyed.

Moreover, when this waste is packed in barrels, the barrel volume is greater than that going into the incineration process. While the ash does not contain dioxin at as high a level as the incinerated waste, it still is a substance which will have to be safely disposed of in some way.

(c.) During the history of the incinerator, there have been seventy-four (74) "kiln puffs" which is a situation where the air pressure at some point inside the incinerator is greater than that of the outside air. Tr. at 384-85. The significance of these "puffs" needs to be explained. Under normal operation (i.e., nothing going wrong), the incinerator is supposed to be under negative pressure, which means that the ambient air pressure is greater than the pressure inside the incinerator. The important part about this, at least to the Court when it approved the test burn in *National Toxic's Campaign* and the earlier test burn in this case, is that this negative pressure situation would prevent leaks and ameliorate fear of explosion. In other words, if some hole or breach appeared in the system, outside air would leak in instead of toxic material leaking out and a violent eruption would be in the form of an implosion rather than an explosion. The evidence of these seventy-four "puffs" removes, in the Court's mind, this previously envisioned safeguard.

11. The risk assessment studies presented by the defendants did not take the above problems into consideration and, therefore, are of limited value to the Court.

12. The Court regrets that neither side called a responsible person with VSC so that a determination could be

made by the Court of the efficiency of the incineration operation and the competence of the people running it.

13. The danger of a tornado or a fire caused by lightning can never be ruled out. However, in view of the fact that the incineration will take one and one half to three years to be completed, at least in the short run, say for the next six months to a year, events such as a tornado or a fire would threaten both the stored wastes and the incinerator, rather than just the stored wastes alone.

14. While it is not given this Court to have the ability to peer into the future, and a natural calamity may strike at any moment, after viewing all the evidence of the case, the Court is convinced that there is more danger from something going wrong with the present incineration process than there is from natural calamity.

III. CONCLUSIONS OF LAW

In determining whether a preliminary injunction should issue, the Court should consider:

> (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 113 (8th Cir.1981).

A. IRREPARABLE HARM

Defendants' attempts to establish the safety of the incinerator leave the Court with the impression that incinerator's ability to destroy dioxin to a level of 99.9999% is at the very best uncertain. The many explanations and opinions of how the incinerator has demonstrated its ability

to achieve 99.9999% fall short of convincing the Court that incineration is safe for the residents of Jacksonville. For example, defendants make much of the assertions that the 99.9999% standard is merely a performance-based rather than a risk-based standard and that the incinerator has demonstrated this performance level on a surrogate material that is harder to burn than dioxin. However, the fact remains that they have not demonstrated that dioxin is being burned at a 99.9999% level and indeed seem to admit that dioxin is leaving the stack at a level exceeding .0001% of the waste feed.

Given the ability of dioxin to cause non-cancer effects, and in all probability cancer effects, plaintiffs have succeeded in convincing the Court that the risk of irreparable harm from incineration is sufficient under *Dataphase*. The incinerator is located in a residential area where there are many pathways through which dioxin may be exposed to humans. For example, humans may be exposed through the inhalation pathway, dermal pathway, and fruit and vegetable pathway among others. In the Court's opinion there is a very real risk that humans may be exposed to unacceptable levels of dioxin if the incineration is allowed to continue without more positive proof that the incinerator is operating at the efficiency which defendants allege.

B. BALANCE OF THE HARM

The risk of harm to defendants in this matter is almost solely monetary. Although the government defendants have a certain interest in protecting the health of the general public, that interest is also well represented by plaintiffs. Given the plaintiffs' showing of potential irreparable harm to human health, the Court is inclined to hold that the risk of harm falls more heavily on the plaintiffs than on the defendants.

C. PROBABILITY OF SUCCESS ON THE MERITS

Eventually the standard for this Court to determine whether plaintiffs will ultimately be entitled to permanent injunctive relief is whether defendants have "contributed or ... [are] contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (West Supp.1992). At this juncture, plaintiffs must only establish their probability of success under this standard.

To a great extent, plaintiffs' probability of success is tied to their showing of potential irreparable harm. "Imminent and substantial endangerment" is, in this Court's opinion, closely akin to irreparable harm. As stated before, plaintiffs have shown that incineration presents potential harm from dioxin exposure that has not been satisfactorily rebutted by defendants' efforts to assure the Court of the safety of the incinerator and its emissions. Furthermore, as this Court has ruled in the February 12, 1993, hearing, defendants have not demonstrated that the incinerator can achieve a 99.9999% DRE on dioxin itself as is required by 40 C.F.R. § 264.343 and the contract between the State of Arkansas and VSC. Indeed, the Court must infer from defendants' failure to attempt to calculate a DRE for dioxin that a 99.9999% level cannot, in fact, be achieved.

D. PUBLIC INTEREST

It is obvious that both plaintiffs and defendants have the interest of the general public at hand although their ideas as to how that interest will best be served are quite divergent. It is safe to say that the interest of the general public is in using the safest and most reliable methodology available to "neutralize" the potential hazardous consequences associated

with the drummed waste. Defendants' position is that incineration is the safest and most reliable methodology available. On the other hand, plaintiffs are of the opinion that incineration itself causes an imminent and substantial endangerment to human health.

Although the Court cannot at this point definitively adopt either position, the fact that incineration may cause irreparable harm to the residents of Jacksonville looms in the forefront of this Court's analysis. The interest of the residents of Jacksonville may well eventually be served best by incineration of the drummed waste. However, that conclusion is uncertain until the benefit of a trial on the merits is available to the Court, plaintiffs' showing of the potential irreparable harm must rule the day.

IV. ORDER

For the foregoing reasons, plaintiffs' motion for preliminary injunction is granted. Therefore, defendants, their officers, agents, employees, successors, attorneys and all those in active concert or participation with them are directed to refrain from incinerating drummed hazardous wastes at the Vertac site which have not already been shredded in preparation for incineration.[3]

Separate Defendant Vertac Site Contractors' motions in limine regarding the use of telephone testimony and the admissibility of the draft "dioxin reassessment" from EPA were both granted from the bench during the hearing. Separate Defendant, Vertac Site Contractors' Motion to Strike Plaintiffs' Exhibits 14, 15, 17, and 18 and Other Similar Exhibits is denied.

---

[3]In light of the Court's decision that defendants are operating the incinerator in violation of EPA regulations, no bond will be required of plaintiffs at this time. However, defendants are, of course, free to file motions on this issue.

Separate Defendant, Vertac Site Contractors' Motion to Strike and Proffer of Evidence is granted in part and denied in part. The Court will deny defendant's request to strike the exhibits but will grant the request to proffer evidence.

IT IS SO ORDERED on this 17th day of March, 1993.

/s/ Stephen M. Reasoner
United States District Judge

NO. LR-C-684
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA ARKANSAS STATE CHAPTER; and MOTHERS AIR WATCH,

PLAINTIFFS,

VS.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL BROWNER, ADMINISTRATOR; VERTAC SITE CONTRACTORS; and ARKANSAS ATTORNEY GENERAL,

DEFENDANTS.

ORDER

Pursuant to the direction of the United States Court of Appeals for the Eighth Circuit in Arkansas Peace Center v. Arkansas Dep't of Pollution Control and Ecology, No. 93-1720, 93-1765, 93-1769 (8th Cir. filed July 15, 1993), this case is hereby dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED this 16th day of July, 1993.

/s/ Stephen M. Reasoner
United States District Judge

STATUTORY PROVISIONS

Relevant provisions of the Resource Conservation and Recovery Act of 1979, Pub. L. No. 94-580, 90 Stat. 2795, as amended by the Hazardous and Solid Waste Amendments of 1984), Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6981):

Section 7002 (42 U.S.C. § 6972), entitled "Citizens' suits," provides, in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf --
>
> > (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter, or
> > (B) against any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past

> or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . ..

. . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order referred to in paragraph (1)(A), [or] to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B) . . ..

(b)(2)(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment --

> (i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental

Response, Compensation and Liability Act of 1980;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980;

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and is diligently proceeding with a remedial action under that Act; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or section 6973 of this title pursuant to which a potentially responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(b)(2)(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment --

> (i) has commenced and is diligently prosecuting an action under section (a)(1)(B) of this section;
>
> (ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980; or
>
> (iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and is diligently proceeding with a remedial action under that Act.

. . . (f) Other rights preserved

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

Relevant provisions of Comprehensive Environmental Response Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, as amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 and 26 U.S.C. § 9507):

Section 104 (42 U.S.C. § 9604) provides, in pertinent part:

> Response authorities
>
> (a) Removal and other remedial action by President . . .
>
> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant

> at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such removal and remedial action will be done properly and promptly by the owner or operator of the vessel or facility or by any other responsible party, the President may allow such person to carry out the action . . ..

Section 106 (42 U.S.C. § 9606) provides, in pertinent part:

> Abatement actions.
>
> (a) Maintenance, jurisdiction etc.
>
> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be

necessary to protect public health and welfare and the environment.

Section 113 (42 U.S.C. § 9613) provides, in pertinent part:

(b) Jurisdiction; venue

Except as provided in subsection[] (h) of this section, the United States district court shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.. . .

(h) Timing or review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (pertaining to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section

> 9606(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 9606(b)(2) of this title.
>
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> (5) An action under section 9606 of this title in which the Untied States has moved to compel a remedial action.

Section 114 (42 U.S.C. § 9614), entitled "Relationship to other law," provides:

> (a) Additional State liability or requirement with respect to release of substances within State
>
> Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or

requirements with respect to the release of hazardous substances within such State.

Section 121 (42 U.S.C. § 9621), entitled "Cleanup standards," provides, in pertinent part:

(d) Degree of cleanup

(1) Remedial actions selected under this section or otherwise required or agreed to by the President under this chapter shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment.. . .

(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if --

(i) any standard, requirement, criteria, or limitation under any Federal environmental law, including, but not limited to, the Toxic Substances Control Act, the Safe Drinking Water Act, the Clean Water Act, the Marine Protection Research and Sanctuaries Act, or the Solid Waste Disposal Act (citations omitted); or

(ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting

> law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 9604 of this title or secured under section 9606 of this title shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation..

. .

(e) Permits and enforcement

(1) No Federal, State or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

Section 302(d) (42 U.S.C. § 9652(d)), entitled "savings provision," provides:

> (d) Nothing in this chapter shall affect of modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

Section 310 (42 U.S.C. § 9659), entitled "Citizens suits," provides in pertinent part:

Except as provided . . . in section 113(h) of this title (relating to timing of review), any person may commence a civil action on his own behalf --

(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter . . .

(h) Other rights

This chapter does not affect or otherwise impair the rights of any person under Federal, State or common law, except with respect to the timing of review as provided in section 9613(h) of this title or as otherwise provided in section 9658 of this title (relating to actions under state law).

SUPREME COURT, U.S.
FILED
MAR 11 1994
OFFICE OF THE CLERK

No. 93-1124

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER; MOTHERS AIR WATCH,

Petitioners,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, Director; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL BROWNER, Administrator; VERTAC SITE CONTRACTORS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT VERTAC SITE CONTRACTORS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Vertac Site Contractors operates a hazardous waste incinerator under contract with the United States Environmental Protection Agency ("EPA") at the Vertac Superfund Site in Jacksonville, Arkansas, incinerating abandoned barrels of hazardous waste, some contaminated with low levels of dioxin. The EPA selected incineration as the removal action at the Vertac Site under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9604. The question presented is whether Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), bars citizen suits brought pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and other bases, that challenge and seek to enjoin an ongoing cleanup action EPA selects as necessary to protect human health and the environment from an imminent and substantial endangerment.

RULE 29.1 LISTING

The parent company of Morrison Knudsen Corporation (an Ohio corporation) is Morrison Knudsen Corporation (a Delaware corporation). The subsidiaries of Morrison Knudsen Corporation (an Ohio corporation), other than wholly-owned subsidiaries, are data-Cache Corporation, MK-CICAL Holding Company, Inc., Texas TGV Corporation, Construcciones Y Servicios Especializados S.A. de C.V., Metrovias, S.A., MK-Intertec Limited, Morrison Knudsen Rail Systems of Argentina, S.A., and Talleres Sudamericanos S.A.

MRK Incineration Company has no parent companies or nonwholly owned subsidiaries to list.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1124

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA, ARKANSAS STATE CHAPTER; MOTHERS AIR WATCH,

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ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, Director; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CAROL BROWNER, Administrator; VERTAC SITE CONTRACTORS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT VERTAC SITE CONTRACTORS' BRIEF IN OPPOSITION

The respondent, Vertac Site Contractors ("VSC"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case reported at 999 F.2d 1212 (1993).

STATEMENT OF THE CASE

Petitioners instigated this action to enjoin the incineration of thousands of leaking and deteriorating drums of hazardous waste at the Vertac Superfund Site in Jacksonville, Arkansas. These wastes, some of which contained low levels of dioxin, had been abandoned by the former operator at the site, and in their unremediated condition presented one of the most serious threats to human health and the environment in the entire country. *See* 40 C.F.R. pt. 300 App. B (1992) (listed on the National Priorities List as the nation's eighteenth worst site). In response to this imminent and substantial endangerment, EPA selected incineration as the appropriate initial remedy for the cleanup of the site, pursuant to its authority under Section 104 of CERCLA, 42 U.S.C. § 9604. The central legal issue in this case involves the application of Section 113(h) of CERCLA, which Congress specifically enacted to foreclose challenges to ongoing removal or remedial actions selected under CERCLA, so that the EPA and the states could take prompt action to remedy dangerous conditions at Superfund sites unhampered by legal battles. *See* H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 1 at 81; pt. 3 at 23 (1985).

A. CERCLA's Primary Goal Is To Promote the Cleanup of Hazardous Substances.

The primary purpose of CERCLA is the prompt cleanup of hazardous waste sites posing threats to the public health, welfare or the environment. *Alabama v. EPA*, 871 F.2d 1548, 1557-58 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989). Consistent with the goal of effectuating cleanup, Section 113(h) of CERCLA bars judicial review of any challenges to EPA-selected CERCLA removal or remedial response actions, except in five limited circumstances. *See* 42 U.S.C. § 9613(h). Section 113(h) does not contain any exception for RCRA citizen suits. Section 113(h)(4) does provide an exception for CERCLA citizen suit challenges, but only where plain-

tiffs challenge a *completed* response action. *See* 42 U.S.C. § 9613(h)(4). The express language of CERCLA provides that federal courts shall have no jurisdiction "to review *any challenges*" to a CERCLA-approved cleanup action, except in specifically listed circumstances not present in this case. *Id.* § 9613(h) (emphasis added).

B. The RCRA Regulation at Issue in This Case Is a Performance-Based Standard.

RCRA regulations require incinerators burning dioxin-containing wastes to meet certain "performance standards." *See* 40 C.F.R. § 264.343. The regulations at issue in this case require an incinerator burning dioxin-containing hazardous wastes to achieve a destruction and removal efficiency ("DRE") of 99.9999 percent (the "six 9s" requirement) on a designated surrogate constituent that is more difficult to incinerate than dioxin. *See id.* § 264.343(a)(2); *Arkansas Peace Center v. Arkansas Dep't of Pollution Control and Ecology*, 999 F.2d 1212, 1214 (8th Cir. 1993), Petitioners' Appendix (hereafter "Pet. App.") at 4a-5a. The regulations on their face require that the efficiency of the incinerator be tested using a harder-to-burn surrogate rather than dioxin itself. 40 C.F.R. § 264.343(a)(2).

The DRE calculation determines the incinerator's burning efficiency by comparing the mass of certain designated constituents put into the incinerator with the mass of those same constituents as they leave the incinerator stack. *Id.* § 264.343(a)(1). A DRE of 99.9999 percent, or a "six 9s DRE," means that the incinerator is operating at a level of efficiency where, for every million molecules of a designated constituent put into the incinerator, only one molecule is not destroyed. Section 264.343 therefore establishes a technology-based standard to measure the efficiency of an incinerator rather than setting substantive guidelines for what concentrations of dioxins can safely be emitted from the incinerator.

C. Incineration at the Vertac Site Constitutes an EPA-Approved CERCLA Response Action.

The Petition emphasizes the State's involvement in the incineration at the Vertac site. Petition at 10. However, the EPA has been actively involved at the Vertac Site ever since the Site was abandoned in 1987, with 28,000 corroding drums of hazardous waste left behind. When the Arkansas Department of Pollution Control and Ecology ("ADPC&E") contracted with VSC for the incineration of the drummed wastes, the EPA assisted the incineration efforts by maintaining the drummed waste, conducting off-site air monitoring, handling and transporting the drums for incineration, and disposing of the incinerator ash. Pet. App. at 4a. After the State had depleted the funds in the Vertac Site's litigation-created trust fund, EPA then contracted with VSC for the incineration of waste. Pet. App. at 9a.

D. The Proceedings Below.

Petitioners filed a complaint against VSC, ADPC&E and EPA on October 28, 1992, seeking preliminary and permanent injunctive relief to halt the incineration at the Vertac Superfund Site that the EPA had determined was necessary to avoid significant risks of exposure to the nearby population. EPA had also determined that the incinerator met all applicable RCRA regulations and concluded, based on empirical air monitoring data collected during incineration, that the incineration of wastes did not exceed any of EPA's health-based action levels for dioxin.[1] The petitioners' complaint raised a variety of federal and supplementary state claims, but focused on allegations that 40 C.F.R. § 264.343(a)(2) required

[1] The EPA has conducted continuous on-site and off-site ambient air monitoring at all times when the incinerator has operated. Pet. App. at 6a. The EPA prepared a risk assessment using that air monitoring data, and concluded that, "the excess probability of cancer associated with the incineration of dioxin was within the acceptable range." Pet. App. at 6a.

the incinerator to demonstrate a six 9s DRE on dioxin itself, rather than on the harder-to-burn surrogate principal organic hazardous constituent ("POHC") that the regulations required VSC to use in the trial burns.[2]

After an October 29, 1992 hearing, the district court entered a temporary restraining order enjoining VSC from incinerating some of the dioxin-containing wastes. Pet. App. at 16a-17a. After an additional hearing on the issue of whether the RCRA regulation at issue, Section 264.343, required VSC to test the efficiency of its incinerator using dioxin or a harder-to-burn surrogate, the district court issued an Amended Temporary Restraining Order. Pet. App. at 18a-19a. The February 16, 1993 Amended Temporary Restraining Order prohibited VSC from incinerating any of the wastes pending a scheduled March 4, 1993 preliminary injunction hearing. *Id.*

Like its prior temporary restraining orders, the district court's March 17, 1993 preliminary injunction order was based largely on its conclusion that Section 264.343 (a)(2) required the Vertac incinerator to demonstrate a six 9s DRE on dioxin itself, rather than on the harder-to-burn surrogate required by the regulations. The express language of the district court's order illustrates that the district court based its finding of potential irreparable harm on the premise that the incinerator had not met the regulatory requirements. *See, e.g.*, Pet. App. at 27a, 28a.

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[2] The Petition refers to an amended complaint as forming the basis of petitioners' claims. Petition at 11. However, petitioners did not even file the amended complaint until July 1, 1993, well after the oral arguments to the Eighth Circuit on the appeal of the preliminary injunction. Petitioners never obtained leave of court to file their amended complaint. *See* Fed. R. Civ. P. 15(a). While the amended complaint is similar to the original complaint, it added a diversity claim. Contrary to petitioners' statements, Petition at 11, the complaint at issue in this case does not allege diversity jurisdiction and that issue was never before the courts below.

On appeal of the preliminary injunction order, the Eighth Circuit held that the petitioners' claims, "although couched in terms of a RCRA violation, challenge a removal action" and therefore were barred under Section 113(h) of CERCLA. Pet. App. at 12a. The Eighth Circuit also held that, because the incineration was an EPA-approved CERCLA removal action, RCRA expressly barred the petitioners' RCRA citizen suit for imminent and substantial endangerment. Pet. App. at 13a-14a. *See* 42 U.S.C. § 6972(b)(2)(B)(ii).

The Eighth Circuit also concluded that, "if we were free to consider the merits of this appeal, we would entertain no doubt that the district court erred in its reading of 40 C.F.R. § 264.343." Pet. App. at 14a. The Eighth Circuit reached this result by relying on the express language of the regulation as well as the legislative history surrounding the regulation to conclude that EPA had specifically rejected the proposal to require trial burns on dioxin itself rather than on a harder-to-burn surrogate. *Id.* at 15a. Despite the petitioners' claims to the contrary, this case does not involve a situation where Section 113(h) has acted to protect activities in violation of the requirements of RCRA. *See* Petition at 10-11. Petitioners' assertion that the Eighth Circuit applied Section 113(h) to bar inquiry into an activity violating public health standards is therefore wrong. *See id.* at 14.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS ARE NOT IN CONFLICT OVER THE MEANING OF SECTION 113(h) OF CERCLA.

Petitioners try to create a conflict where none exists. Each case petitioners rely on to support their claim of lower court conflict is either distinguishable on its facts, or is misinterpreted by the petitioners.

The decision in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994) is clearly distinguishable from petitioners' claims here. *Colorado* involved a dispute between the United States and Colorado over whether Colorado could use its hazardous waste authority to clean up a portion of a site that the United States was cleaning up under CERCLA. The Tenth Circuit held that a state could maintain a RCRA citizen suit against the United States under 42 U.S.C. § 6972(a)(1)(A), despite the argument by the United States that Section 113(h) of CERCLA barred the claim. 990 F.2d at 1579. The Tenth Circuit went to great pains to distinguish such a state-instigated citizen suit from a private party citizen suit challenging a response action, holding that the express congressional intent behind Section 113(h) was to bar private party attempts to challenge CERCLA response actions, not to bar a state's effort to enforce its RCRA-delegated hazardous waste laws. *Id.* at 1576-77.[3]

Petitioners err in referring to *Alabama v. EPA*, 871 F.2d 1548, 1559 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989), as being in conflict with the Eighth Circuit's holding in this case. Petitioners wrongly assert that the court in *Alabama* reviewed certain claims "to the extent

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[3] The Eighth Circuit's decision in this case distinguished the *Colorado* decision for these same reasons. Pet. App. at 13a. Petitioners also filed their petition for certiorari prior to this Court's denial of certiorari in *Colorado*.

they were not solely a challenge to the response action for a Superfund site." *See* Petition at 18. The court did no such thing. In fact, the *Alabama* court held that Section 113(h) barred the plaintiffs' claims in their entirety because they all sought injunctive relief to stop an ongoing response action under CERCLA. 871 F.2d at 1560. None of the plaintiffs' claims escaped the jurisdictional bar of Section 113(h). The court only stated in *dicta* how it *would* hold on a limited issue *if* the plaintiffs' complaint were not jurisdictionally barred under Section 113(h). *Id.* at 1559.

The two other district court cases on which the petitioners rely are also readily distinguishable on their facts.[4] The purpose of Section 113(h) is to bar challenges to ongoing removal or remedial actions. 42 U.S.C. § 9613(h). However, the court in *Yslava v. Hughes Aircraft Co.*, Nos. 91-525-TUC-JMR, 92-564-TUC-JMR, slip op. at 10 (D. Ariz. Nov. 17, 1993), *reprinted in* 27 Chem. Waste Litig. Rep. 640 (1994), held that medical monitoring was not a CERCLA removal or remedial action and therefore concluded that plaintiffs' suit for medical monitoring fell outside the scope of Section 113(h). In other words, since the court determined that medical monitoring was not a CERCLA removal or remedial action, the court found that the plaintiffs could not be challenging an ongoing response action and thus did not apply Section 113(h). The *Yslava* court also noted that, even if medical monitoring were within the scope of Section 113(h), plaintiffs' claim for medical monitoring did not constitute a challenge to a CERCLA response action based on the facts involved and would therefore not be barred by Section 113(h). *Id.*

The decision in *Chemical Waste Mgmt., Inc. v. EPA*, 673 F. Supp. 1043, 1055 (D. Kan. 1987), is distinguishable because, unlike the case here, there was no ongoing

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[4] Even if these cases were not distinguishable, this isolated variation in lower court opinions is not sufficient to justify this Court's review of the matter.

CERCLA response action involved. For that reason, the court held that Section 113(h) was "facially inapplicable." *Id.* at 1055. In *Chemical Waste Mgmt.*, owners of a commercial hazardous waste incinerator sued the EPA to challenge a policy the EPA had applied to their incinerator. The incinerator was not located on a Superfund site subject to cleanup under CERCLA. Instead, the owners used the incinerator to incinerate waste sent to them by various parties across the nation. The determination that Section 113(h) did not bar the incinerator owners' challenge to EPA policy does not apply to the facts at issue here, where the petitioners without question challenged EPA action at a site where there was an ongoing removal action under CERCLA. *See Hanford Downwinders Coalition v. Dowdle*, Nos. CS-93-0245-AAM, CS-93-0290-AAM, 1993 WL 555970 at *9 n.3 (E.D. Wash. Dec. 23, 1993) (distinguishing *Chemical Waste Mgmt.* on same basis).[5]

Petitioners' attempt to create conflict with basically one circuit court decision is also repudiated by the overwhelming number of court decisions holding that the jurisdictional bar of Section 113(h) is far-reaching and bars any challenge, including those brought as RCRA citizen suits, to an ongoing response action.[6]

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[5] The constitutional challenge cases petitioners rely on to illustrate conflict are not applicable to this case since there are no constitutional claims at issue here. Each case is also distinguishable on its facts.

[6] *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) (Section 113(h) barred RCRA and NEPA challenges to ongoing response action); *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1024 (3d Cir. 1991) (Section 113(h) deprives district court of power to hear claims "under the [National Historic] Preservation Act, or any other statute that would interfere with EPA's clean-up activities on a Superfund site."); *Schalk v. Reilly*, 900 F.2d 1091, 1095, 1097 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990) (barred CERCLA citizen suit and NEPA claims challenging incineration of hazardous wastes since response action not yet com-

II. THE ISSUE BELOW WAS CORRECTLY DECIDED AND DOES NOT IMPLICATE AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

At the heart of petitioners' argument for why their petition should be granted is a disagreement with Congress' policy determination that the remedial goals of CERCLA should not be thwarted by challenges to ongoing cleanup activities. Petitioners' disagreement with the policies of CERCLA are more appropriately addressed to Congress than to this Court. Review is especially unwarranted in this case, where the Eighth Circuit determined that, if it were deciding the merits of the case, it would have concluded that Vertac complied with the applicable RCRA incineration regulations. *See* Pet. App. at 14a; *see also supra* at 6.

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plete); *Alabama*, 871 F.2d at 1557 (dismissed preliminary injunction granted in CERCLA citizen suit action which had enjoined EPA from implementing response action); *Hanford Downwinders*, 1993 WL 555970 at *12-*13 (rejected plaintiffs' argument that Section 113(h) should be read to bar challenges based on alleged monetary or property damages, but to not bar claims that are based on threats to human health); *Heart of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (E.D. Wash. 1993) (barred RCRA citizen suit action contending state and federal defendants failed to properly report releases under RCRA and CERCLA); *Reynolds v. Lujan*, 785 F. Supp. 152, 153-54 (D.N.M. 1992) (barred RCRA citizen suit claiming that defendant landfill had disposed of waste in violation of RCRA provision and created an imminent and substantial endangerment); *Werlein v. United States*, 746 F. Supp. 887, 892-94 (D. Minn. 1990) (barred claims for injunctive relief under RCRA, CERCLA, Clean Water Act, a state counterpart statute and common law as challenges to an ongoing response action), *vacated in nonrelevant part*, 793 F. Supp. 898 (D. Minn. 1992); *Neighborhood Toxic Cleanup Emergency v. Reilly*, 716 F. Supp. 828, 834-35 (D.N.J. 1989) (barred CERCLA citizen suit).

A. Petitioners' Allegation That Their Claims Are Not Barred by Section 113(h) Is Flawed.

Petitioners argue that Section 113(h) does not bar their RCRA citizen suit claims because, while the RCRA citizen suit provisions expressly outline when they cannot be applied to CERCLA actions, the CERCLA citizen suit provisions and Section 113(h) never even mention RCRA. Petition at 22-24. Petitioners therefore conclude that the RCRA citizen suit provisions, which define the particular situations where RCRA citizen suits cannot be brought, are the only provisions which limit the ability of petitioners to bring a RCRA citizen suit. Petition at 24 n.6.[7]

Petitioners' interpretation of the applicability of Section 113(h) is flawed. The legislative history surrounding Section 113(h), as well as its express language, makes clear that Section 113(h) acts as a bar to claims other than those brought under CERCLA. The express language of Section 113(h) is broadly stated to bar "any challenge" to an ongoing CERCLA cleanup except for limited and defined exceptions. 42 U.S.C. § 9613(h). RCRA citizen suits are not one of the defined exceptions. Courts applying Section 113(h) have also uniformly rejected petitioners' argument, concluding that the jurisdictional bar of 113(h) bars RCRA citizen suit claims. *See, e.g., North Shore,* 930 F.2d at 1244; *Heart of*

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[7] The cases on which petitioners rely do not warrant a different result, nor do they support the need for review in this case. *Supporters to Oppose Pollution v. Heritage Group,* 973 F.2d 1320 (7th Cir. 1992), did not involve a situation where there was an ongoing removal or remedial action under CERCLA and therefore the case never considered the interaction between RCRA and Section 113(h). In *Lujan,* 785 F. Supp. at 154, the court did conclude that the provisions of RCRA independently precluded review in the case. However, it also held that Section 113(h) applied to bar the plaintiffs' RCRA challenges to the cleanup, confirming that Section 113(h) does not only bar challenges pursuant to CERCLA. *Id.*

America, 820 F. Supp. at 1282-84; *Lujan*, 785 F. Supp. at 153-54; *Werlein*, 746 F. Supp. at 892-94.[8]

B. Section 113(h) of CERCLA Protects the Important Public Policy of Preventing Delay in the Cleanup of Hazardous Substances.

Relying on legislative history, a number of courts have concluded that the limitations imposed by Section 113(h) on a district court's jurisdiction are an integral part of Congress' overall goal to prevent unnecessary delay in implementing hazardous waste cleanups. *See, e.g., Boarhead*, 923 F.2d at 1019; *Schalk*, 900 F.2d at 1095, 1097. These courts note that Congress balanced the right to immediate review against the overall goal of cleanup and decided on the side of prompt cleanup. Congress specifically acknowledged the very concerns petitioners raise here but rejected them:

> This is a valid argument and one which both neighbors of sites and potentially responsible parties have asserted. Neither of these persons want to see an inadequate or inappropriate remedy built. . . . Notwithstanding these arguments, the conferees decided to ensure expeditious cleanups by restricting such pre-implementation review.

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[8] Petitioners' assertion that their state claims and diversity claims are not subject to the jurisdictional bar of Section 113(h) is also wrong. As addressed previously, the diversity claims were not pleaded in the complaint at issue in this case and therefore were never in issue. *See supra* at 5 n.2. Petitioners similarly failed to raise to the Eighth Circuit the state law argument they now raise. In any event, state law, to the extent it challenges an ongoing response action pursuant to CERCLA, is considered an impermissible challenge under Section 113(h). *See Werlein*, 746 F. Supp. at 893 (holding that Section 113(h) "by its very terms states that the Court has no subject matter jurisdiction to hear 'any challenges under federal law . . . or under state law.' The fact that the statute states it applies to state law shows that Congress intended Section 9613(h) to extend beyond CERCLA.").

132 Cong. Rec. H9583 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman). Petitioners, despite this legislative history, simply wish that the balance had tipped in the other direction.

Congress therefore did recognize that the jurisdictional bar of Section 113(h) might lead to tradeoffs, but concluded that, in situations like the one here, where EPA determines there is an imminent and substantial endangerment requiring immediate action to protect the public, EPA must be free to take the necessary response action without interference. Courts have been sensitive to the potential tradeoff between prompt cleanup and immediate review, but, like the Eighth Circuit here, have consistently interpreted the law as Congress wrote it—to bar challenges to an EPA-approved response action until the cleanup is complete.

For example, *Boarhead* involved a site subject to a CERCLA response action which also contained an ancient American Indian burial ground. 923 F.2d at 1013. The plaintiff brought an action pursuant to the National Historic Preservation Act seeking to protect the Indian remains and artifacts on his property from the damage likely to occur during the cleanup of his property. *Id.* at 1013-14. The court held that Section 113(h) barred the plaintiff's claim, even though the court recognized that the absence of jurisdiction in *Boarhead* might do more than simply delay review, but instead might even "destroy or severely damage the site's historical value." *Id.* at 1021. Nevertheless, the court held that it lacked jurisdiction under Section 113(h) to review the plaintiff's claim until the response action had been concluded, noting that any relief to the plaintiff "must come from Congress." *Id.*

Similarly, in *Hanford Downwinders,* the court held that claims alleging a threat to human health were barred by the express provisions of Section 113(h). 1993 WL 555970 at *13. The court concluded that "[h]arsh as

this result may be, it is compelled by the severely restrictive language Congress has chosen to limit the jurisdiction of the federal courts. Remedy for this harm must be sought with Congress, who should by now be well aware of how the courts have unanimously interpreted section 113(h)." *Id. See also In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551, 1560-61 (E.D. Wash. 1991); *Werlein*, 746 F. Supp. at 894 (barring citizens' challenges to an ongoing CERCLA removal action under Section 113(h), court recognized congressional intent to prohibit such challenges until the completion of the cleanup, even though this application of Section 113(h) in part frustrated the purposes underlying the statutes on which plaintiffs based their claims).[9]

The case law confirms congressional intent to provide EPA with the ability to act quickly to stabilize those situations posing an imminent and substantial endangerment to the public. Such holdings do not eviscerate RCRA, but instead confirm the legislative purpose of protecting the public by enacting Section 113(h). Certainly, the case

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[9] The cases petitioners represent as evidencing concern about Section 113(h) precluding review are clearly distinguishable from this case. *See* Petition at 25. The *North Shore* court, while recognizing that in some instances Section 113(h) may practically preclude any effective review, declined to explore the outer bounds of Section 113(h). 930 F.2d at 1245. Similarly, the case of *Cabot Corp. v. EPA*, 677 F. Supp. 823 (E.D. Pa. 1988), involved only a suit for money damages brought by plaintiffs, which the court held was barred by Section 113(h). In *dicta*, the court did draw a distinction between claims for monetary damages and citizen suits alleging irreparable injury, but because the plaintiffs had no claim for irreparable injury, the court never actually analyzed the effect of Section 113(h) on an irreparable injury claim. *Id.* at 829-30. *See also Hanford Downwinders*, 1993 WL 555970 at *13 (distinguishing *Cabot Corp.* and noting that at least two courts have specifically addressed and rejected its dicta). Finally, as discussed previously, *Chemical Waste Mgmt.*, 673 F. Supp. 1043, is inapposite to the case at bar since it did not involve a situation where there was an ongoing response action under CERCLA.

at bar provides no reason to reject the balance adopted by Congress to effectuate prompt cleanup in light of the Eighth Circuit's conclusion that, if it were to look at this case on its merits, it would have held that VSC, EPA and ADPC&E properly interpreted and applied RCRA to the incineration of wastes at the site. Pet. App. at 14a. In any event, to the extent petitioners disagree with the policies and practical implications of Section 113(h), their remedy is with Congress and not with this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 93-1124

In the Supreme Court of the United States

OCTOBER TERM, 1993

ARKANSAS PEACE CENTER, ET AL., PETITIONERS

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a suit claiming that a response action carried out pursuant to Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604, violated an incinerator performance standard promulgated by the Environmental Protection Agency pursuant to the Resource Conservation Recovery Act of 1976, is a "challenge" to the response action, and consequently barred by Section 113(h) of CERCLA, 42 U.S.C. 9613(h), until the action is completed.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 999 F.2d 1212. The orders of the district court (Pet. App. 16a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1993. A petition for rehearing was denied on August 30, 1993 (Pet. App. 3a). On November 22, 1993, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including January 7, 1994. The petition was filed on January 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the Vertac Site in Arkansas at which herbicides were manufactured over a period of 35 years. As part of the manufacturing process, wastes containing low concentrations of dioxin were produced, put into drums, and stored. In 1987, the manufacturer abandoned the Site, leaving behind 28,000 drums of waste. Soon thereafter, the Environmental Protection Agency (EPA) used its authority under CERCLA to stabilize the remaining drums and to place them in temporary storage. Pet. App. 4a. Since the waste was both corrosive and flammable, this storage did not provide a long-term solution. Incineration under appropriately rigorous conditions was chosen as the preferred method for permanent removal of the large quantity of dioxin-containing wastes.[1]

The Arkansas Department of Pollution Control and Ecology (ADPC&E) contracted with a joint venture known as Vertac Site Contractors (VSC) to conduct the incineration. The project was funded with money from a trust fund established under earlier litigation against the manufacturer. Pet. App. 4a.[2] VSC

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[1] For a discussion of the appropriateness of incineration as a treatment method for dioxin-containing wastes, see *Final Rule: Hazardous Waste Management System; Dioxin-Containing Wastes*, 50 Fed. Reg. 1978, 1990-1991 (1985).

[2] EPA determined to conduct incineration support activities (air monitoring, drum handling, and removal and disposal of the incinerator ash) under authority of CERCLA Section 104, 42 U.S.C. 9604. Pet. App. 4a. EPA conducted an Engineering Evaluation/Cost Analysis concerning these activities, which was subject to a 30-day public comment period, immediately followed by a public meeting in Jacksonville. A summary of

erected a rotary kiln incinerator, and on January 2, 1992, ADPC&E certified that VSC had successfully demonstrated its ability to meet applicable state and federal regulatory requirements. Pet. App. 5a. In doing so, ADPC&E imposed numerous conditions on VSC's incineration operation.

2. The particular EPA requirement that has been at issue in this case provides that an incinerator burning certain dioxin-containing wastes must demonstrate a destruction and removal efficiency (DRE)[3] of 99.9999% (the "six 9s" standard) on surrogate constituents more difficult to incinerate than dioxin, but not on dioxin itself. 40 C.F.R. 264.343(a)(2).[4] See Pet. App. 5a. In the 1985 rulemaking which set this

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the nature of the comments received, and responses thereto, is in the record as Plaintiff's Exh. 22. See C.A. App. 1738-1741 (containing an excerpt of PX. 22).

[3] Destruction and removal efficiency (DRE) is defined in 40 C.F.R. 264.343(a)(1) by the following formula: DRE = 100% x (waste in minus waste out)/(waste in), where "waste in" is the mass feed rate of the pertinent constituent in the waste stream fed into the incinerator and "waste out" is the mass emission rate of the same constituent present in exhaust emissions prior to release to the atmosphere.

[4] EPA promulgated this regulation under the authority of Section 3004(a) of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6924(a), which authorizes the Administrator to promulgate requirements for owners and operators of facilities for the treatment, storage or disposal of hazardous wastes "as may be necessary to protect human health and the environment." RCRA also authorizes EPA to approve state hazardous waste programs to operate in lieu of the federal RCRA program. 42 U.S.C. 6926(b). Arkansas has adopted EPA's incinerator performance standards by reference in its EPA-approved hazardous waste program. See ADPC&E Regulation No. 23 (Hazardous Waste Management), ch. 2, § 3.

standard, EPA concluded that, because of the small concentrations of isomers of dioxins and furans in wastes, it is "not possible to measure and calculate a six 9s DRE * * * with the needed accuracy." 50 Fed. Reg. 1991 (1985). Accordingly, EPA required that compliance be demonstrated by performing a trial burn on "a surrogate Principal Organic Hazardous Constituent (POHC) that is more difficult to incinerate" than dioxin, rather than on dioxin itself. *Ibid.*

3. In response to concerns expressed by environmental groups, EPA reviewed the State's approval of the Vertac incinerator and agreed that VSC was in compliance with the applicable federal standard. EPA noted that 40 C.F.R. 264.343(a)(2) requires that incinerators burning dioxin wastes demonstrate compliance with the six 9s standard, "in a trial burn, using a compound that is more difficult to destroy than dioxin," and that "[d]uring all three trial burn runs, the incinerator achieved a destruction efficiency of over 99.9999 percent" for hexachlorobenzene, which is "more difficult to destroy than dioxin." C.A. App. 2013. The ADPC&E, in consultation with EPA, imposed emission limits on the incinerator, and EPA has conducted continuous air quality monitoring during operation of the incinerator. Pet. App. 6a. The air monitoring has shown that emissions from the incinerator have not exceeded allowable levels. C.A. App. 2134. EPA has also performed a detailed site-specific risk assessment utilizing extensive air monitoring data. See *id.* at 2347-2510.

4. Because the trust fund was insufficient to complete the incineration, EPA Region VI determined in September of 1992 to complete the incineration pur-

suant to Section 104 of CERCLA. Pet. App. 6a.[5] On October 28, 1992, petitioners filed their complaint in the United States District Court for the District of Arkansas, seeking to enjoin the State, EPA and the contractor from incinerating the drummed waste at the Site. The central allegation of the complaint was that the contractor had allegedly failed to demonstrate that the incinerator could destroy 99.9999% of the dioxin present in the waste. C.A. App. 28-29.

On October 30, 1992, the district court granted in part petitioners' request for a Temporary Restraining Order. Pet. App. 16a-17a. The court's order enjoined further burning of the higher concentration "T wastes" at the Site. *Id.* at 7a.

On December 24, 1992, EPA filed a motion to dismiss, pointing out several jurisdictional defects. EPA pointed out, inter alia, that Section 113(h)(4) of CERCLA bars judicial consideration of citizen's suits challenging EPA's planned CERCLA removal action, until that action is "taken" or "secured," *i.e.*, completed. 42 U.S.C. 9613(h)(4). This motion to dismiss was briefed, but was not acted on by the district court. Pet. App. 7a.

On February 16, 1993, the district court amended its temporary restraining order, extending it to prohibit incineration of all dioxin-containing wastes at the Site. Pet. App. 18a-19a. The court interpreted

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[5] With regard to this decision, EPA conducted a public comment period, properly noticed in the Jacksonville, Arkansas newspaper, from March 17, 1993 to April 16, 1993. EPA received no comments during this period. As the court below noted (Pet. App. 9a), EPA took over supervision of the incineration from the State when the trust fund ran out in June of 1993.

EPA's incinerator performance regulation as requiring a 99.9999% destruction and removal efficiency demonstration on dioxin itself. *Id.* at 19a. The court certified the regulatory interpretation issue for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 18a. On March 2, 1993, the court of appeals granted motions for interlocutory appeal, and issued a stay pending appeal. *Id.* at 8a.

On March 17, 1993, the district court entered a preliminary injunction barring all defendants from incinerating drums of hazardous wastes at the Vertac Site. Pet. App. 30a. The court found that petitioners had shown a probability of success on the merits because "defendants have not demonstrated that the incinerator can achieve a 99.9999% DRE on dioxin itself as is required by 40 C.F.R. 264.343." *Id.* at 29a. Defendants appealed from the preliminary injunction, and the court of appeals entered further stays on March 17 and April 2, 1993. *Id.* at 8a.

On July 14, 1993, the court of appeals reversed the preliminary injunction and remanded with directions to dismiss the case for lack of subject matter jurisdiction. Pet. App. 15a. The court found that the language of Section 113(h) of CERCLA, 42 U.S.C. 9613(h), showed that citizen suits challenging a removal or remedial action taken under CERCLA Section 104 were barred "until the action has been 'taken' or 'secured'—in other words, completed." Pet. App. 11a. The court noted that "[o]ther courts have consistently held that challenges to remedial actions based on violations of other statutes, including RCRA, are barred under section 113(h)." *Id.* at 12a. The court rejected petitioners' contention that suits to enforce requirements under RCRA could proceed

despite the jurisdictional bar found in Section 113(h). The court distinguished the decision in *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), on grounds that the holding in that case was expressly limited to attempts by a State to enforce its hazardous waste requirements. Pet. App. 13a.

The court of appeals further stated that "if we were free to consider the merits of this appeal, we would entertain no doubt that the district court erred in its reading of 40 C.F.R. § 264.343." Pet. App. 14a. The court found that the language of the regulation and EPA's explanation in the preamble to the regulation were clear that the 99.9999% standard must be demonstrated on a surrogate that is harder to burn than dioxin, not on dioxin itself. *Id.* at 15a.

ARGUMENT

Section 113(h) of CERCLA imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA response actions.[6] That Section provides that no federal court shall have jurisdiction to review "any challenges to removal or remedial action" selected under CERCLA except through five specific avenues. 42 U.S.C. 9613(h). Subsection 113(h)(4) allows an action under CERCLA's citizen suit provision, Section 310, 42

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[6] Response actions include, generally, relatively short-term "removal" actions and more permanent "remedial" actions. 42 U.S.C. 9601(23)-(25). The term "removal" specifically includes "the disposal of removed material." 42 U.S.C. 9601(23). A "remedial action" includes "those actions consistent with a permanent remedy taken instead of or in addition to removal actions." 42 U.S.C. 9601(24).

U.S.C. 9659, but only once the response action has been "taken" or "secured." 42 U.S.C. 9613(h)(4).

As the court of appeals noted (Pet. App. 11a-12a), the lower courts have consistently held that by using the past tense (*i.e.*, the words "taken" or "secured") in Section 113(h)(4), Congress demonstrated its intent that the response action actually be completed before a citizen suit may be filed. See *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.) ("The plain language of the statute indicates that section 113(h)(4) applies [to confer jurisdiction] only after a remedial action is actually completed."), cert. denied, 493 U.S. 991 (1989); *Schalk* v. *Reilly*, 900 F.2d 1091, 1095 (7th Cir.) ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy."), cert. denied, 498 U.S. 981 (1990); *Neighborhood Toxic Cleanup Emergency* v. *Reilly*, 716 F. Supp. 828, 834-835 (D.N.J. 1989) (Section 113(h)(4) prohibits review through citizen suits until the remedial action selected is completed). See also 132 Cong. Rec. 29,736 (1986) ("The phrase '[t]aken or secured' as used in this section means that no person may bring any lawsuit in Federal court regarding a federally approved removal or remedial action except when the removal action has been completed or when the remedial action has been taken or secured.") (statement of Rep. Glickman).[7]

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[7] Cases involving suits by potentially responsible parties have reached the same conclusion that Congress intended to bar lawsuits that would delay cleanups at Superfund sites. See, *e.g.*, *North Shore Gas Co.* v. *EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) (challenges under RCRA and the National Environmental Policy Act to remedial action are "blocked by the blunt

1. Petitioners initially try to avoid the bar of Section 113(h) by contending that "an attempt to ensure that a cleanup will be conducted in compliance with RCRA and other public health standards and will not cause serious harm to public health is not a challenge to the response action." Pet. 21. But as the courts have recognized, suits alleging that cleanups do not comply with other statutes, such as RCRA, are the precise type of "challenges" that are deferred by Section 113(h) until the cleanup is completed. See *North Shore Gas Co.* v. *EPA*, 930 F.2d at 1244 (challenges under RCRA and the National Environmental Policy Act are barred by Section 113(h)); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1024 (3d Cir. 1991) (Section 113(h) deprives district court of power to hear claims "under the [National Historic] Preservation Act, or any other statute, that would interfere with EPA's clean-up activities on a Superfund site"); *Reynolds* v. *Lujan*, 785 F. Supp. 152, 153-154 (D.N.M. 1992) (Section 113(h) bars RCRA claims until cleanup completed).

Petitioners (Pet. 23) attempt to distinguish their situation from this consistent line of authority by focusing on language in the citizen suit provision of RCRA. Section 7002(a)(1)(B) of RCRA authorizes

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withdrawal of federal jurisdiction in section 113(h)"); *Voluntary Purchasing Groups, Inc.* v. *Reilly*, 889 F.2d 1380, 1388 (5th Cir. 1989) ("it is clear that CERCLA explicitly limits judicial review of remedial and removal plans where such review will delay cleanup"); *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 386 n.1 (8th Cir. 1987) (Court "agree[d] with the district court's decision that it lacked jurisdiction to review the merits of an EPA clean-up order [under CERCLA Section 106] prior to an attempt by EPA to enforce it").

suit against "any person, including the United States, * * * who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6972(a)(1)(B). Subsections 7002(b)(2)(B) and (C) withdraw this cause of action where either the federal or state government uses either RCRA or CERCLA authority to address the endangerment created by the defendant. 42 U.S.C. 6972(b)(2)(B) and (C). Petitioners draw the unwarranted implication that this is the only limitation Congress intended to place on RCRA citizen suits which may affect CERCLA cleanups. Thus, they argue, since Congress did not place a similar limitation on RCRA citizen suits which allege violations of permits, standards, or regulations, see 42 U.S.C. 6972(a)(1)(A), Congress must have intended that such suits could go forward even in cases where they might interfere with a CERCLA cleanup.[8]

Petitioners' broad conclusion does not follow from the limiting language of RCRA Section 7002(b)(2)(B) and (C). This limitation simply shows that Congress did not want a citizen suit under that Section, which is directed at persons who have contributed to the creation of "an imminent and substantial endanger-

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[8] The court of appeals did not address this particular argument since petitioners primarily relied below upon a different theory, *i.e.*, that the cleanup at the Vertac Site was not being carried out pursuant to CERCLA. See Appellees' C.A. Br. 28-29. The court of appeals rejected this theory (Pet. App. 13a-14a) and petitioners have not pursued it in their petition.

ment," to interfere with governmental efforts to address the situation. The language in no way suggests that Congress intended to tolerate suits that challenge the cleanup action itself. That type of challenge is addressed directly by CERCLA Section 113(h), which was enacted two years after the RCRA provisions relied upon by petitioners. Such a challenge to a removal or remedial action under CERCLA is barred until the action in question is "taken" or "secured." The fact that Section 113(h) applies to "*any* challenges to removal or remedial actions" is fatal to petitioners' arguments. 42 U.S.C. 9613(h) (emphasis added).[9]

2. Petitioners rely heavily on *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), to support their argument that a RCRA citizen suit is not a "challenge" to a removal or remedial action. As we pointed out in our petition in *Colorado* (U.S. Pet. in No. 93-786 at 18, 20-21), the Tenth Circuit's holding that the State's enforcement of a compliance order was not a "challenge" to the remedial action in that case was inconsistent with the plain language of the statute, and conflicted with cases such as *Boarhead Corp.* v. *Erickson* and *Schalk*

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[9] As Representative Glickman, a member of the Conference Committee on the Superfund Amendments and Reauthorization Act of 1986, observed regarding Section 113(h):

> The timing of review section covers all lawsuits, under any authority, concerning the response actions that are performed by EPA * * * . The section also covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. 29,735 (1986).

v. *Reilly*. In addition, we noted that the Tenth Circuit's decision created a conflict of greater "practical significance" with the Sixth Circuit's decision in *United States* v. *Akzo Coatings of Am., Inc.*, 949 F.2d 1409 (1991). U.S. Pet. in No. 93-786 at 18. *Akzo Coatings* held that a State could not bypass CERCLA's "ARARs"[10] process and apply its environmental standards independently of CERCLA. The question whether a State can bypass the ARARs process is not presented here; indeed, Arkansas has consistently supported the incineration remedy at the Vertac site. In this respect, there would appear to be less reason for granting review in this case than there was in *Colorado*.

Moreover, if the decision below is any indication, courts may simply read the anomalous decision in *Colorado* narrowly. See Pet. App. 13a (noting that "[t]he Tenth Circuit limited its holding to an action brought by a state, and distinguished *Schalk* on the ground that *Schalk* was a citizen action"). Moreover, the court in *Colorado* opined that the State "does not seek to halt the Army's Basin F interim response action * * * [and] is not seeking to delay the cleanup." 990 F.2d at 1576. While we disagreed with that

[10] The "ARARs" process derives from CERCLA Section 121(d)'s requirement that a remedy achieve the level of cleanup specified pursuant to "applicable" or "relevant and appropriate" requirements under federal or state environmental law. 42 U.S.C 9621(d). To the extent practicable, "[f]und-financed removal actions under CERCLA section 104 and removal actions pursuant to CERCLA section 106 shall * * * attain [compliance with ARARs]." 40 C.F.R. 300.415(i). Through the ARARs process, States are given an extensive role in the development, selection, and enforcement of the CERCLA remedy. See 42 U.S.C. 9621(d)-(f).

characterization of the facts in *Colorado*, it nonetheless highlights that this case falls squarely within the bar of Section 113(h). Petitioners here sought to stop the selected remedy (incineration) from proceeding, and that is precisely what the district court ordered (see Pet. App. 30a). Moreover, as the district court recognized, under petitioners' reading of the regulation it would probably never be possible to demonstrate that an incinerator has achieved a 99.9999% DRE on dioxin itself. See Pet. App. 23a ("the Court must conclude[] that defendants have not, and probably cannot, demonstrate 99.9999% DRE on dioxin").[11] Thus, petitioners effectively challenged the choice of incineration as an appropriate method for disposing of dioxin-contaminated wastes. That sort of challenge is clearly barred by the plain language of Section 113(h) until the removal or remedial action has been "taken" or "secured."[12]

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[11] As EPA explained in the preamble to the 1985 regulation (50 Fed. Reg. 1991):

> [D]etermining compliance with a six 9s DRE * * * standard for these wastes would be very difficult, if not impossible, without a system for surrogate POHCs as established in § 264.342. The concentrations of the [dioxins and furans] in these wastes are too low to find measurable amounts in the stack gas (at six 9s DRE) at present limits of detection, and public health considerations preclude, in most cases, "spiking" the waste with higher concentrations of [dioxins and furans].

[12] Petitioners point (Pet. 16-17) to the Tenth Circuit's discussion of the RCRA citizen suit provision, 42 U.S.C. 6972, as establishing that "there can be no question that the claims asserted by petitioners could be brought in the Tenth Circuit." The Tenth Circuit simply suggested in *dictum* that "Colorado

3. Petitioners misapprehend the nature of the decision below by stating (Pet. 26) that it embodies a conclusion that "CERCLA completely extinguishes RCRA's public health protections * * *." To the contrary, the RCRA standards for incinerators, as substantive federal regulations which have been incorporated into Arkansas law, do apply in this case as ARARs. See CERCLA Section 121(d)(2)(A)(ii), 42 U.S.C. 9621(d)(2)(A)(ii) (applying legally applicable state standards to "remedial actions"); 40 C.F.R. 300.415(i) (state standards apply to "[f]und-financed removal actions * * * to the extent practicable"); C.A. App. 2530 (identifying 40 C.F.R. Pt. 264 as an ARAR for the removal action in this case). Contrary to petitioners' argument (Pet. 22), CERCLA's ARARs process is designed to ensure that a cleanup is conducted in a manner that protects public health. See Section 121(d)(1), 42 U.S.C. 9621(d)(1) (cleanups must "at a minimum * * * assure[] protection of

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could arguably seek enforcement of the final amended compliance order in federal court pursuant to [42 U.S.C.] § 6972(a)(1)." 990 F.2d at 1578. The court stressed, however, that "we need not decide this issue." *Ibid.* To the extent that this *dictum* suggests that Section 113(h) would not defer a citizen suit claiming that the selected response action at a CERCLA site violates a RCRA provision, it seems clearly wrong. Since it is *dictum*, however, the potential conflict with the decision below does not warrant review at this time.

Petitioners' strained attempt to characterize *Alabama* v. *EPA*, *supra*, as consistent with *Colorado* is plainly misguided. *Alabama*, 871 F.2d at 1557-1559, held that a district court lacked jurisdiction over a citizen suit challenge to an ongoing CERCLA remedial action, and only addressed the merits of the claim as an alternative holding, much like the court below (see Pet. App. 14a-15a).

human health and the environment"). As we noted in our petition in *United States* v. *Colorado*, No. 93-786 (at 7 n.3), "Section 121(d) employs ARARs to provide a comprehensive mechanism for state input in planning the CERCLA response action," and "Section 121(e)(2) expressly allows the States to enforce the ARARs once a remedy is selected." Thus, requirements which have been designated as ARARs apply to CERCLA response actions, but simply cannot be made the basis for a pre-implementation citizen suit challenge to such an action.[13]

4. Petitioners also err in placing reliance (Pet. 22) on the fact that Congress did not evince an intent to bar state law nuisance actions. The pertinent point is that Congress *did* bar federal courts from reviewing preimplementation challenges to removal or remedial actions, which is what petitioners attempted to do here. As this case illustrates, a suit alleging that a selected removal action does not comply with standards promulgated pursuant to RCRA is precisely

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[13] By barring challenges to remedial or removal actions, Section 113(h) simply channels citizens' input into the cleanup process to other times. This approach reflects Congress's judgment that the benefits of citizens' suits in protecting public health are outweighed by the risk created by delaying CERCLA cleanups and the costs of the resulting piecemeal litigation. See 132 Cong. Rec. 28,441 (1986) (statement of Sen. Thurmond). Here, the risks from delaying the removal action are particularly evident: Because of the highly corrosive nature of the wastes, the drums containing the wastes continue to degrade and pose a constant threat of leaking, as well as the even more serious threat of uncontrolled release caused by fire or severe weather. Appellants' C.A. Br. 48.

the type of delaying litigation that Congress sought to avoid.[14]

5. Finally, the substance of the challenge petitioners brought against the incineration was plainly insubstantial. As the court of appeals noted, EPA made clear when it promulgated the regulation in question that the required DRE calculation should be demonstrated on a surrogate that is more difficult to incinerate than dioxin, not on dioxin itself, since dioxin is generally found in very low concentrations. Pet. App. 15a. EPA specifically found in this case that the Vertac incinerator successfully demonstrated a 99.9999% DRE on hexachlorobenzene, and that hexachlorobenzene is "more difficult to destroy than dioxin." C.A. App. 2013. See also Pet. App. 14a-15a. Petitioners have suggested no persuasive reasons to doubt those conclusions. Hence, the judgment

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[14] Petitioners complain (Pet. 22 n.5) that even if their claim based on RCRA regulations is barred at this time, the court of appeals still should not have dismissed their "diversity and state law claims." It is not clear precisely which claims petitioners are referring to. Petitioners did raise a nuisance claim in their complaint, but never pursued that claim, and never informed the court of appeals that they were making a separate nuisance claim. Petitioners should accordingly be held to have waived that undeveloped nuisance claim. Moreover, petitioners did not allege diversity under 28 U.S.C. 1332 as a basis for the court's jurisdiction until an amended complaint filed on July 1, 1993, after oral argument in the court of appeals and just two weeks before the court of appeals decided the case (Pet. App. 3a). In any event, the court of appeals' alleged failure to address petitioners' "diversity and state law claims" is a matter that petitioners should have raised with the court of appeals in their petition for rehearing, yet their petition made no mention of it.

below would be correct even if CERCLA Section 113(h) were not a bar.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-1124

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ARKANSAS PEACE CENTER, ET AL. *Petitioners,*

VS.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL. *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

The Arkansas Department of Pollution Control & Ecology (ADPC&E) disputes the Petitioners' contention that the Eighth Circuit decision conflicts with decisions of other circuits. For this point, Petitioners rely almost exclusively on the Tenth Circuit's recent decision in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993) *cert. denied*, 114 S.Ct. 922 (Jan. 24, 1994). ADPC&E argues that the Petitioners misconstrue the holding in *United States v. Colorado* and that there is no conflict with the Eighth Circuit's decision.

Petitioners also claim that the Eighth Circuit erroneously decided an important federal question by ignoring factual findings by the trial court indicating a threat to the public health and environment. ADPC&E responds that the Eighth Circuit correctly concluded that the trial court's factual conclusions were predicated upon a clearly erroneous interpretation of applicable law.

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ARGUMENT

The Arkansas Department of Pollution Control & Ecology (ADPC&E) submits this brief response as a supplement to those filed by its co-respondents, the Environmental Protection Agency (EPA) and Vertac Site Contractors.

As noted at App. 9a, ADPC&E's formal control over the Vertac Incineration Project ended during the pendency of the appeal to the Eighth Circuit. Thus, the original request for injunctive relief against ADPC&E has been rendered moot. ADPC&E continues, however, to be intensely concerned about riddihg the City of Jacksonville, Arkansas of the threat posed by the Vertac hazardous wastes. For this reason, ADPC&E responds in opposition to the Petition For A Writ of Certiorari submitted by the Arkansas Peace Center (APC).

I. THERE IS NO CONFLICT AMONG THE CIRCUITS IN NEED OF RESOLUTION CONCERNING THE MEANING OF CERCLA SECTION 113(h)

APC bases the first point of its Petition on the contention that the decision of the Eighth Circuit in this case squarely conflicts with the recent decision of the Tenth Circuit in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993) *cert. denied*, 114 S.Ct. 922 (Jan. 24, 1994). To a large extent, APC hoped to parlay the prospects of this Court granting the federal government's Petition For a Writ of Certiorari in *United States v. Colorado* to their advantage, and cited the federal government's arguments for their Petition in that case as supporting APC's Petition here. *See* APC Petition at 17-18. This Court's recent denial of the Writ of Certiorari in *United States v. Colorado* renders a significant portion of APC's argument on this point moot.

As to whatever force remains of Point I of APC's Petition,

ADPC&E can offer a unique perspective. The State of Arkansas served as both a defendant/appellant in this case and filed as an *amicus* participant on behalf of the State of Colorado in *United States v. Colorado.* ADPC&E fully supports the Tenth Circuit's resolution of the important issue involved in *United States v. Colorado,* but is just as committed in its opposition to APC's unwarranted extension of that holding to hinder ADPC&E's and EPA's attempts to remedy the environmental threat posed by the Vertac site.

In determining whether a conflict between the circuits actually exists, the Court should examine the actual holdings and discern whether they can be harmonized. In the case of *United States v. Colorado,* the Tenth Circuit's holding is naturally restricted to the facts before it for resolution. The Tenth Circuit expressly stated the important issue posed for review:

> At issue is whether a state which has been authorized by the . . . EPA to "carry out" the state's hazardous waste program "in lieu of" RCRA . . . is precluded from doing so at a hazardous waste treatment, storage and disposal facility owned and operated by the federal government which the EPA has placed on the national priority list . . . and where a CERCLA response action is under way.

United States v. Colorado, supra at 1567. The Tenth Circuit held that the State of Colorado could indeed assert its state authority as authorized under RCRA to influence the closing of a surface impoundment at a federal facility even if the same waste management unit was also the subject of a CERCLA response action. This holding resolved long-standing tension between the EPA and RCRA-authorized States over the degree of residual state authority at a federal facility when remediation efforts had entered the ambit of CERCLA.

The only factual coincidences between *United States v.*

Colorado and the present case are that Arkansas is also a RCRA-authorized state and that Vertac is listed on the National Priority List. The distinctions, however, dispel APC's contentions that the Eighth Circuit's decision in this case conflicts with the Tenth Circuit's decision in *United States v. Colorado*. The present case does not involve a facility where the state seeks to invoke its RCRA-authorized state authority; both ADPC&E and EPA concur that the Vertac site entered the ambit of CERCLA when the previous operator abandoned both operations and RCRA corrective actions in early-1987. The present case does not involve a federal facility; before it discontinued operations, Vertac was a private enterprise engaged in the manufacture and formulation of herbicides and pesticides. And most significantly, the present case does not involve a dispute between state and federal officials; both ADPC&E and EPA have concurred on the appropriate response measures necessary to deal with the relentlessly corroding drums of hazardous waste present at the Vertac site.

Thus, ADPC&E can support the Tenth Circuit's decision in *United States v. Colorado* in anticipation of circumstances where ADPC&E's authority as a RCRA-authorized state may be plenary as a matter of law, yet cooperation from federal officials is not forthcoming. That is not the case here, however. As the party most directly affected by any invocation of *United States v. Colorado*, ADPC&E can comfortably live with both the Eighth Circuit's and the Tenth Circuit's holdings. On this practical basis, APC's suggestion that these holdings are hopelessly irreconcilable should be rejected.

APC also reads *United States v. Colorado* as posing a more expansive judicial definition of what constitutes a "challenge" to a CERCLA response action than was applied by the Eighth Circuit in the present case. The Tenth Circuit's decision was more narrowly crafted than APC contends. In *United States v. Colorado*, the Tenth Circuit noted that a state's efforts to enforce

its own hazardous waste laws at a federal facility where a CERCLA response action is in progress is not necessarily a challenge to the response action prohibited by CERCLA Section 113(h). Colorado was not seeking to halt the CERCLA response activities; rather, the State was seeking to assure, through the right of approval of a closure plan, that the cleanup of a surface impoundment was in accordance with state law.

In contrast, in this case APC sought to halt the CERCLA response action at the Vertac site conducted by both ADPC&E and EPA, and succeeded to the extent of getting the district court to issue a temporary restraining order and a preliminary injunction enjoining removal activities at the site. The Eighth Circuit, recognizing APC's actions as direct challenges to response actions prohibited by CERCLA Section 113(h), stayed each of these injunctive orders, and eventually ruled that the trial court lacked subject matter jurisdiction to even entertain APC's challenges to ADPC&E's and EPA's chosen response actions. In so holding, the Eighth Circuit aligned itself with the consensus of the circuits facing this issue, and held that a pre-implementation challenge to a CERCLA response action cannot be reviewed by the federal courts pursuant to Section 113(h) of CERCLA.

For these reasons, APC's suggestion that a conflict exists among the circuit courts should not be credited, and the Petition should not be granted on this ground.

II. IMPORTANT QUESTIONS OF FEDERAL LAW WERE NOT ERRONEOUSLY DECIDED BELOW

ADPC&E's co-respondents will directly address the discrete challenges to the Eighth Circuit decision raised in APC's Petition. ADPC&E's response here is restricted to the important question of federal law actually litigated at length below, but not raised as a point of error by APC.

Aside from the jurisdictional issues, the central issue of this

dispute below revolved around how the operational efficiency of an incinerator burning dioxin contaminated waste should be demonstrated. The trial court erroneously concluded that 40 C.F.R. 264.243(a)(2) required a demonstration of 99.9999% Destruction and Removal Efficiency (DRE) on dioxin itself rather than on a harder to burn surrogate. From this flawed premise, the trial court presumed irreparable harm and a probability that APC would succeed on the merits. *See* App. 29a.

The DRE issue was briefed extensively to the Eighth Circuit, which addressed the issue even though it did not have to. The Circuit Court noted that 40 C.F.R. 264.243(a)(1) on its face did not require a DRE demonstration on dioxin itself, a fact even conceded by the trial court (App. 14a). To counter the trial court's assumption about the purpose of the regulation, the Circuit Court cited EPA's contemporaneous explanation of the regulation which stated that demonstrating DRE on dioxin would be difficult, if not impossible (App. 15a). Given the unambiguous language of the regulation, and the fact that respondents' implementation of the DRE requirement was consistent with the rationale stated for the regulation when it was promulgated, the Eighth Circuit concluded that the trial court's reading of 40 C.F.R. 264.243(a)(2) was incorrect as a matter of law (App. 14a). In fact, the Eighth Circuit went so far as stating that the trial court's erroneous application of the DRE regulation provided independent grounds for dismissal of the APC challenge to the Vertac response action (App. 15a).

It is notable but not surprising that APC does not raise the Eighth Circuit's construction of the DRE regulation as a ground for review by this Court; on its face, the regulation is clear and does not admit much room for competing interpretations. In considering the alarming implications evoked in its Petition, however, this Court should recognize that the trial court's factual findings touted by APC (*See* Petition at 26) were inextricably tied to an erroneous application of the law. The Eighth Circuit did not

ignore direct evidence of threats to the public health in favor of a legal technicality; instead, it correctly discounted the trial court's factual conclusions because they were predicated upon a clearly incorrect conclusion of law.

For this reason, APC's contention that an important federal question was erroneously decided below should be rejected.

CONCLUSION

For the reasons stated herein and by its co-respondents, ADPC&E respectfully requests that APC's Petition For A Writ of Certiorari be denied.

Respectfully submitted,

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v.

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1124

ARKANSAS PEACE CENTER, *et al.*

Petitioners,

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, *et al.*,

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The federal defendants do not dispute that there is a conflict among the circuits on the question presented in this petition. Nor do they dispute the importance of the issue. Indeed, in petitioning this Court to decide the same issue earlier this Term, the Solicitor General highlighted both the conflict and the significance of the underlying issue. *See* Petition for a Writ of Certiorari in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). Thus, the Solicitor General's position significantly undercuts the attempt by the other defendants to minimize both the conflict and the importance of the issue.

1. The holding of the Eighth Circuit conflicts squarely with *United States v. Colorado*. In that case, the Tenth Circuit concluded that an action to enforce a state's authority under the Resource Conservation Recovery Act ("RCRA") is not barred by section 113(h) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") because it is not a challenge to the CERCLA response action. *Id.* at 1575, 1576. The Tenth Circuit refused to read section 113(h) to implicitly repeal RCRA's enforcement provisions, and instead construed RCRA's citizens' suit provisions to permit certain RCRA actions to go forward, even where they concern activities at a CERCLA site. *Id.* at 1575-79; *see also Yslava v. Hughes Aircraft Co.*, Nos. 91-525-TUC-JMR & 92-564-TUC-JMR (D. Ariz. Nov. 17, 1993), *reprinted in* 27 Chem. Waste Lit. Rep. 640 (1994) (section 113(h) does not bar claim for medical monitoring of people exposed to contaminated water from Superfund site). The Tenth Circuit acknowledged that section 113(h) applies equally to actions brought by state and private citizen plaintiffs, and for that reason, its holding conflicts with the Eighth Circuit's ruling. Indeed. the government argued in its petition for a writ of certiorari in *Colorado* (at 18) that the Tenth Circuit's interpretation of section 113(h) "is at odds with" the very cases on which it relies in its opposition at 8-9, 11-12. This case warrants review to resolve the conflict among the courts of appeals on the applicability of section 113(h) to RCRA claims.

2. In its opposition to the petition, the government rewrites the question presented to focus solely on whether section 113(h) bars review of one of plaintiffs' claims -- that the incineration of dioxin-containing wastes violated a RCRA performance standard. In fact, plaintiffs' petition also seeks review of whether section 113(h) bars two additional types of claims: namely, plaintiffs' claim that the incineration is causing an imminent and substantial endangerment to human health and plaintiffs' diversity and pendent state law claims to enforce state public health and common law nuisance

standards. The government completely sidesteps the imminent endangerment claim, and relegates the nuisance claim to a footnote. Government Opposition at 16 n.14; *see also* Vertac Site Contractors' Opposition at 12 n.8.

Those claims, however, go to the very heart of this lawsuit. Plaintiffs have alleged (and proven to the satisfaction of the only judge to address this issue) that the incineration of dioxin-containing waste at the Vertac site is causing an imminent and substantial endangerment to human health. The cause of the endangerment (and nuisance) is not the hazardous waste site that is being addressed by the cleanup activities; instead, it is the cleanup itself. In other words, the challenge is to a cleanup that is causing, rather than ameliorating, the harm to plaintiffs.

Because the government ignores plaintiffs' imminent endangerment claim, it understates the import of RCRA's citizen suit provision. Opposition at 9-11. RCRA precludes citizen imminent hazard lawsuits only where the CERCLA response action is abating the conditions creating the endangerment. 42 U.S.C. § 6972(b)(2)(C). By its express terms, RCRA imminent hazard lawsuits may be brought to challenge activities undertaken in the course of a CERCLA response action, which are themselves causing the imminent endangerment. The RCRA citizen suit provision controls because it specifically addresses the viability of citizen suits with respect to CERCLA response actions, while section 113(h) of CERCLA never mentions RCRA, and the only reference in the CERCLA conference report to RCRA claims connected to Superfund cleanup activities indicates that they should be given priority treatment in the courts -- not deferred indefinitely as defendants contend. H.R. Rep. No. 962, 99th Cong., 2d Sess. 225 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276, 3318. Postponing review of imminent endangerment claims until the cleanup has been completed would extinguish such claims altogether,

despite the complete absence of any indication that Congress intended such a harsh result.[1]

3. Finally, the government is simply wrong in its assertion that the judgment below is correct because the court of appeals indicated in *dicta* that it disagreed with the district court's interpretation of a pertinent RCRA regulation, even though the court of appeals did not state whether its interpretation would require outright dismissal of any, let alone all, of plaintiffs' claims. *See* Petition at 14 n.3. That regulation formed the basis of only one of plaintiffs' claims and only one of the grounds for the preliminary injunction at issue. Plaintiffs' imminent endangerment claim does not rise or fall with the court of appeals' interpretation of the RCRA regulation, nor do their state law claims. Since the case was before the court of appeals on a motion for a preliminary injunction, the Eighth Circuit's statement concerning one of plaintiffs' claims that supported the preliminary injunction does not form an independent basis for dismissing the entire case.[2]

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[1]The government and Vertac selectively quote floor statements made by Members of Congress favoring the most expansive reading of section 113(h), and ignore the conference report, which is the most credible piece of legislative history on the meaning of section 113(h), as well as the countervailing floor statements of proponents of a narrow reading of section 113(h). Government Opposition at 8, 11 n.9, 15 n.13; Vertac Opposition at 12-13.

[2]Since the case never proceeded beyond the preliminary injunction stage, plaintiffs cannot be said to have waived the claims that were not fully developed in their motions for emergency relief. Moreover, Vertac omits the portions of section 113(h) that expressly preserve federal diversity jurisdiction in arguing that such claims are barred by section 113(h). Vertac Opposition at 12 n.8.

CONCLUSION

For the reasons set forth above and in the petition, the petition should be granted.

Respectfully submitted,

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